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THE

CANADIAN LAW TIMES

EDITED BY
CHARLES ELLIOTT, B.A., LL.B.,
Of Osgoode Hall, Barrister-at-Law.

VOLUME XXXI.
1911

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The Canadian Law Times.

VOL. XXXI. JANUARY, 1911. NO. 1.

THE BRITISH BENCH AND BAR.

Having recently, during a leisurely stay in different parts of Great Britain—more particularly in London, Glasgow and Edinburgh—had the profitable pleasure of visiting the Law Courts day after day and observing the way in which justice, both civil and criminal, is administered, it may be of interest to your readers to know about the things that appeal to one most as worthy of praise or criticism. There are, as we know, many people who, either from habits or opinions formed in earlier days or from some other cause, are constantly reminding us that in all matters relating to the procedure of the Courts and the ability and conduct of the Bench and Bar the English are immensely superior. And perhaps they are. But in this, as in all other things, no country has a monopoly of the best of everything, and so it is we find that in some respects we lag far behind them whilst in others we surpass them. Let me tell you some of the impressions or opinions I formed.

First of all, it is plain that the separation of the work of the barrister from that of the solicitor tends to produce, and I am certain does produce, a greater percentage of truth as to facts and a more accurate result as to law than the combined system in vogue with us. Law is not by any means an exact science, but it is surprising how near to perfection it can become in the hands of counsel who are unencumbered with the details and cares of a solicitor's practice, and are thus able to concentrate their whole attention upon a well prepared brief. The examination and cross-examination of witnesses becomes more of an art than with us. Well laid plans to circumvent and entrap the untruthful witness are more in evidence, and the law applicable to the case is stated

or argued with more precision. Counsel are more careful in stating their facts and seldom or never do you hear them contending for a proposition of law except upon grounds that are fairly arguable. Some of our best Canadian counsel take the position that it is their duty to put forward all the points of law that occur to them, leaving it to the Judge, assisted by the opposing counsel, to sift the wheat from the chaff. With a strong Judge this way of handling a case presents no advantages. With a weaker one it ought not to be attempted unless upon the theory that the sole business of counsel is to bear fruit for his client. But counsel is more than an advocate paid to win by any means. He is an official of the Court whose duty it is to assist the Court in arriving at the right conclusion. Time and again do English counsel agree with each other as to what the law is or narrow down the points of law in dispute so as to make it comparatively easy to arrive at a correct decision. And this is, I think, as it ought to be.

Speaking of counsel being well prepared, I once heard a Judge comment upon the way some cases are handled, and this is what, in substance, he said: "If counsel only knew how the presiding Judge appreciates the work of one who is seen to have mastered his brief and to know his facts and law, I think fewer of them would conduct their cases in the careless manner in which they are sometimes conducted. There are few things that tend to put a Judge out of temper so much as to have the whole case both as to facts and law thrown at him with a pitchfork as a farmer handles his fodder. A Judge leans towards helping the man who is seen to be doing his very best and becomes disgusted with the counsel, whatever his ability may be, who is seen not to be prepared." Under this heading it must be admitted that the English Judges have less to complain of than have our own.

It is needless to say, of course, that the English Judge presides with great dignity and has complete command of the Court. It is seldom that counsel steps outside his own territory and seeks to run the Court. The moment he does so he is effectually checked. In the Old Bailey this summer, I heard the trial of a man who was charged with forging a will. The prisoner's counsel, in addressing the Court, made it clear that in his opinion his opponent's conduct of the case had been such as to cause a miscarriage of justice. He said that never during the whole course of his professional experi-

ence had he seen a case conducted with such a total disregard of consequences. Lord Justice Ridley listened to him patiently and then in his own quiet way said, "Mr. ——— you appear to be under the mistaken impression that you are master of the situation here. I need not, of course, remind you that the presiding Judge is supposed to occupy and, as a matter of fact, does occupy that proud position. I do not want to hear anything further from you upon this line." Mr. ——— was of course completely taken back and the trial was proceeded with. But after all the English Judges preside with no more dignity or control than do the Ontario Judges. I can see very little difference between them in that respect. But in another respect we are ahead of them. The Judges are too slow with their work. The shorthand reporting system is not developed as is our own and the result is that the Judge has to make very full notes of the evidence. This takes up unnecessary time, so much so that the subject has been referred to several times in the House of Commons.

One thing very noticeable in connection with the administration of justice in England is the entire absence of any criticism in the public press. This is not surprising so far as the trials of cases are concerned, for we have little of that in this country, but there seems to be little or no criticism of public judicial officers. What occurred to me as strange was that in the *Crippen* case, Scotland Yard was not criticised for allowing Crippen to get out of the country. It will be remembered that they had suspicions as to Crippen some weeks before he left. In fact, Scotland Yard had made one examination of the house and had found nothing. It is true that there was no sufficient evidence of the murder upon which they could have arrested Crippen, but it did seem to Canadians that they might well have kept him under surveillance and thus prevented him from leaving London. This, however, was not done. Strange to say, the London papers instead of offering criticism of Scotland Yard commended the authorities in every way. It is important, of course, that the authorities should receive at all times healthy support. Irresponsible and unwarranted criticism is always to be regretted. But one cannot help feeling that a reasonable amount of well reasoned criticism has a splendid effect in keeping officials stirred up to the point of duty.

Our American friends urge this as a reason for electing their Judges. Andrew Carnegie, on his last visit to Toronto, was heard to say that he was a thorough believer in the system of electing Judges, that there was nothing like public opinion to keep the Bench pure, that he had known several instances where a Judge had done something or taken some position which aroused the suspicion of the public or confirmed them in the belief that he had departed from the path of rectitude, and that when such Judge sought re-election he was invariably defeated.

But I am straying from the path myself.

In looking at the way trials are conducted in English Courts one cannot, with all our admiration, fail to conclude that the High Court of Justice in England is rapidly becoming, if it has not already become, a rich man's Court. The fees that successful barristers command, added to the solicitor's costs which are higher than ours, make the total expense of the litigation out of all proportion to the amount involved unless that amount should be very large. The jurisdiction of the County Courts is much more limited than our own. The client who has a claim of a moderate amount, or who is himself a man of moderate means, hesitates long before availing himself of the Courts. I am not a prophet but I do predict that a radical change in the judicial system is about to take place and that this change will consist largely of a substantial increase in the jurisdiction of the County Courts.

While on this subject of County Courts let me say that at the county sessions three justices of the peace sit with the Judge. They take no part in the trial but when a conviction is made they always consult with the Judge as to the punishment to be meted out. Might not our own county Judges consider whether the plan is practicable here? The question of punishment is not one of law. It is something that calls only for sober common sense and good judgment. In a multitude of counsellors there is often, though sometimes there is not, great wisdom.

A great change has come over the English Bench on this subject of punishment. Lighter sentences are becoming more common and the suspended sentence in the case of first offenders is often made use of where the criminal has theretofore borne a good character and the crime is not of a

serious character. All this you may think is tending in the right direction.

Another feature noticed particularly in the Scotch Courts—whether it is of modern growth or not I cannot say —is the effort that is made to save time in getting out facts as to which there is no dispute. I mean by this the asking of leading questions. A witness is put in the box; it may be necessary to get from him his age, occupation, experience, residence, nationality, whether he was present on the occasion in question, etc. With us, perhaps, a dozen questions would be asked to obtain this information and as many answers received. Not so with them. One question is asked in the following form: "Your name is John Smith, 30 years of age; you are a carpenter with 10 years' experience; you live at 50 Jones street; you are a Scotsman and you were present on the occasion in question?" One answer in the affirmative is given and much time saved.

These are a few of the impressions I received or the things I noticed. I give them for the benefit or otherwise of my brethren of the Bar. If they seem to bear hard upon ourselves let us remember that—

"Those bear reproof the best who merit praise."

OBITER DICTA.

CANADIANS AND THE PRIVY COUNCIL.

The preface of the Canadian Reports (1909) Appeal Cases contains the statement that that series of reports for the year 1909 comprises seventeen appeals to the Privy Council and that six of them were appeals from the Supreme Court of Canada, while eleven of them were from the provincial Courts of Appeal direct to the Privy Council. The idea suggested by this is that the Privy Council is gradually coming to be regarded as the virtual Court of Appeal for Canada, performing towards Canada the functions the Supreme Court was designed to fill. At any rate the volume of Canadian litigation now settled annually in London seems to warrant, as a commercial enterprise, the publication of a series of reports devoted exclusively to the reporting of these Canadian appeals. That there should be this tendency to go direct from the provincial Courts to the Privy Council when the expense is so enormously in excess of that involved in going to Ottawa, would seem to be due to the fact that leave to appeal from judgments of the Supreme Court of Canada is so frequently granted in every day actions that litigants prefer to reach the goal of final determination by the shortest route and so skip the Supreme Court.

When we consider some of the cases in which the Privy Council of late years has granted leave to appeal from judgments of the Supreme Court of Canada, it is apparent that the Canadian practitioner must experience the very greatest difficulty in advising his clients when or under what circumstances, or in what class of case the litigation is likely to be ended if taken to Ottawa. He is always confronted with the probability that if taken to Ottawa it may have to be in the long run fought out all over again in London, in which case there is the added cost and delay of the appeal to Ottawa and of the application to the Privy Council for leave to appeal. Better therefore go direct from the provincial Courts. Do we want to find out the meaning of language used by Canadian legislators in a Canadian statute? London and not Ottawa, it would seem, is where we must go.

In the case of the *Cumberland Railway and Coal Co.* v. *The Saint John Pilot Commissioners*, reported in Canadian

Reports (1910), A. C. p. 31, the Privy Council reversed, upon such a question, the judgment of the Supreme Court of Canada which affirmed the judgment of the Supreme Court of New Brunswick, which latter judgment had affirmed the decision of the trial Judge. And yet the question for decision seems to have been merely what is the meaning of the words " vessels propelled wholly or in part by steam " where they occur in Section 59 of the Pilotage Act, R. C. S. 1886, ch. 80. Does the litigation involve the question of whether the plaintiff gave truthful evidence at the trial of an action, or did the defendant? The opinion from Ottawa would appear to be superfluous and more or less a waste of time and money to get. In *Gordon* v. *Horne*, 1909, 42 S. C. R. p. 240, the Privy Council granted leave to appeal and ultimately reversed the decision of the Supreme Court of Canada which had affirmed the judgment of the trial Judge that the defendant's evidence was entitled to credence. The judgment of the Privy Council was rendered on the 29th of July, 1910, and has not yet been reported. Let the question be merely as to the necessity or otherwise for a new trial of an action and the decision of the Supreme Court of Canada is not immune from review and reversal by the Privy Council. In *Blue et al.* v. *Red Mountain Railway Co.*, 39 S. C. R. p. 390, and 1909, 78 L. J. P. C. 107, the Supreme Court of Canada, by a unanimous judgment declared that a new trial ought to be had between the parties but the Judicial Committee granted leave to appeal and reversed the decision. If the judgment of the Supreme Court of Canada is not to be taken as final and authoritative upon such matters as the above, then it would appear that there is little use in going to Ottawa at all and that there is indeed no sure or certain stopping place for the Canadian litigant short of the Privy Council in any class of action. That we have no Court in Canada whose decisions are final as to the meaning of statutes we make in Canada, the degree of credit to be given witnesses who testify at trials, the necessity or otherwise for new trials of actions is a mild (?) way of making us feel the parentalism of England. Too much parentalism after mature growth has been attained has a tendency to create irritation.

The case of the *Cumberland Railway and Coal Co.* v. *The Saint John Pilot Commissioners* which has been above referred to, arose in this way: The Dominion Parliament had passed a statute exempting from pilotage dues " Ships pro-

pelled wholly or in part by steam." The plaintiff built a number of hulks or barges for the purpose of loading thereon coal, and which when loaded would be towed by means of steam tugs to their destination. The Saint John Pilot Commissioners claimed that the barges were not propelled by steam motive power and demanded pilotage dues which were paid under protest to the extent of $8,192.50, and this action was brought to recover the amount so paid. The trial Judge thought the barges were propelled by steam as a motive power within the meaning of the statute, and gave judgment in favour of the plaintiffs: so also did the Supreme Court of New Brunswick, which dismissed an appeal from the judgment of the trial Judge: so also did the Supreme Court of Canada which likewise affirmed the decision of the trial Judge. The Privy Council, however, granted leave to appeal and reversed the decision of all three Canadian Courts. Lord Gorrell delivered the judgment of the Judicial Committee, and he says: "Their Lordships, after giving very full consideration to the case have come to the conclusion that they are compelled to differ from the decisions below, which, as they at present stand, have been reached by placing a construction upon the Act which is founded on practical considerations . . . rather than upon a natural construction of the words used . . ." and Lord Gorrell says that the word "propelled" in the Canadian Statute "is used as it was by Cicero—*propellere navem remis*—with reference to the motive power possessed by the vessel herself and in this sense it is, in their Lordships' opinion, used in sub-sec. (c)." The sight of barges coal laden, lumber laden, gravel laden, brick laden, hay laden, etc., etc., upon our rivers and great lakes towed by steam tugs is a common one to Canadians, and Mr. Justice Hanington, delivering the judgment of the Supreme Court of New Brunswick which affirmed the decision of the trial Judge, says: "It is a common thing to see a steam tug with two or three of these barges in tow coming down the lakes with coal, lumber and other freight and passing through the canals to ports in the lower lakes. Those I have seen are similar in shape and outfit as these of the plaintiff are described to be, and to me it is quite clear as to what the plaintiffs, when they had these at present in question constructed, intended them to be and how to be propelled or navigated." Thus did three Canadian Courts agree upon the meaning to be ascribed to a Canadian statute, and

thus did the Privy Council overrule their decision. It is not a question of the comparative merits of the two views as to meaning of the language, but whether it is desirable that a litigant defeated in three Courts upon such a question, should have it in his power to bring his opponent over to England for a fourth contest and whether, if he can do so, we really derive much benefit from maintaining a Supreme Court at Ottawa.

The practical question is the excess of expense in going to London with our everyday litigation, over that involved in going to Ottawa. The larger question is the subserviency implied in being obliged to do so. Whatever advantage may have been derivable from appeals to the Privy Council in times past when Canada was sparsely settled, it ought not to be overlooked that we now have a population of over six millions and are approaching nationhood, and nationalism seems to demand and imply the right to have our disputes decided by our own men.

Sir Wilfrid Laurier said at a banquet given in London on June 18th, 1897, to colonial premiers: "Sir, colonies were born to become nations. In my country and perhaps also in England, it has been observed that Canada has a population which, in some instances exceeds, in many others, rivals the populations of independent nations, and it has been said that perhaps the time might come when Canada might become a nation of itself. My answer is this simply, Canada is a nation. A nation without power to settle her own lawsuits!

Different views may be held as to whether this transatlantic supervision of our judiciary is in reality a tie with the mother country. It may become exasperating and annoying if Canadians come to realise that they are competent to settle their own lawsuits and ought to be allowed to do so. It is one of the things that makes the colonial in London feel himself the inferior of his American neighbour. "An American gets more respect in London than a colonist. In my opinion he deserves it." (Essay "The Kingdom of Canada," by John S. Ewart, K.C.)

The Supreme Court of Canada which ought to be *the* Supreme Court for Canada is that in name only. An institution which ought to be a great national institution is a mere appellate tribunal whose judgments are subject to review in London. Canada cannot settle her own lawsuits. "When in 1875 we established our Supreme Court at Ottawa, we

were compelled to forego that power. The authority that France gives to Algiers, and that the midget states of the world possess, is too great to entrust to Canada. . . . Colonists—self-governing colonists they are called—are not allowed to settle their own lawsuits. The Malay States can do that much. . . . Leaving aside these constitutional cases, may I not say that there is, if possible, still less justification for Privy Council intervention in our everday actions. Lacking local knowledge, and all those shades of feeling and points of view which life in Canada alone can give, the Privy Councillors are, as I think, unable to appreciate some of the arguments which to a Canadian are full of significance and meaning. . . . But whether these Privy Council Judges can or cannot appreciate our cases, I, as a barrister and a Canadian, decline to admit that Canada, with her six millions of people, is not as able as the United States was, with its three and a half millions and as the United States is to-day with its eighty millions, or as Algeria is, to decide her own lawsuits. And even if it could be proved that Canadians are unfit to settle their own quarrels, I would object to the degradation involved in the admission of it, and I would contend that it would be better sometimes to make mistakes (the Privy Council makes lots of them) than to be kept forever in leading strings. If we cannot settle our own lawsuits, let us learn to do so by trying." (Essay "The Kingdom of Canada," by John S. Ewart, K.C.)

These views of so eminent a jurist and distinguished a Canadian as Mr. Ewart shew that the subject is demanding attention. Apart entirely from the inferior role the Supreme Court of Canada is compelled to play in Canadian litigation, as matters now stand, a litigious person or a corporation with a purse long enough can wear his weaker opponent out by carrying to London litigation of a class which the Courts of Canada ought to be able to deal with satisfactorily to the Canadian public.

Vancouver, B.C. W. S. DEACON.

IMPERIAL AND INTERNATIONAL AFFAIRS.

SURRENDER OF POLITICAL OFFENDERS.—The case of the man Fedorenko whom the Russian Government is now seeking to have extradited from Canada, has directed much attention to the question of the surrender of a political offender by a State in which he has sought asylum. While this case is *sub judice* at the moment of writing, and we shall, therefore, not presume to discuss it, still it may not be out of place or untimely to consider generally the position of political offenders in international law.

Whether a State is under any abstract *obligation* to deliver up persons, either its own subjects or foreigners, charged with the commission of criminal offences in another country, has proved a *vexata quaestio* among the public jurists. For instance, Grotius (De Jur. Bel. ac Pac. lib. ii., cap. xi.), Heineccius (Prælect, in Grot. j. t.), Burlamaqui (Prin. du Droit de la Nat. et des Gens, tome ii., pt. ib., ch. 3), Vattel (Le Droit des Gens, &c., ii., ch. vi.), and Kent (Comm. vol. i., pt. 1, Sect. ii.) maintain that, according to the law and usage of nations, every sovereign State is obliged to refuse an asylum to persons charged with crimes affecting the general peace and security of society at large. The following English cases seem to affirm the doctrine of the jurists so laid down:—*R.* v. *Hutchinson*, 3 Keble, 785; *Lundy's Case*, 2 Vent. 314; *R.* v. *Kimberly*, Str. 848; *East India Co.* v. *Campbell*, 1 Ves. 246; *Mure* v. *Kay*, 4 Taunt. 34. So far as American case-law in support of this doctrine goes, one of the most important authorities is the opinion of Chancellor Kent expressed in *Re Washburn* (4 Johns. Ch. at p. 108), where he says: "It is the law and usage of nations, resting on the plainest principles of justice and public utility, to deliver up offenders charged with felony, and other high crimes, and fleeing from the country in which the crime was committed, into a foreign and friendly jurisdiction." There is an early Canadian case to the same effect, viz., *Rex* v. *Ball*, decided by Reid, C J., of the Court of Queen's Bench, at Montreal, on June 20th, 1827. The judgment of the Chief Justice is reported in full in the *American Jurist*, vol. 1, p. 297, and is so replete with learning on the subject as to deserve careful attention. Speaking of the duty to surrender criminals he

says: "It is founded on the principle that he who has caused an injury is bound to repair it, and he who has infringed the laws of any country is liable to the punishment inflicted by those laws. If we screen him from that punishment we become parties to that crime, we excite retaliation, we encourage criminals to take refuge among us—we do that as a *nation*, which, as *individuals*, it would be dishonourable, nay criminal to do. . . ." So far, for authorities supporting the doctrine of obligatory surrender. On the other hand, we find publicists of the standing of Puffendorf (Elem. lib. viii., cap. 3), Voet (De Stat. sec. xi.), Martens (Droit des Gens, liv. iii. ch. 3), Klüber (Droit des Gens, liv. iii., ch. 3), Heffter (Europäische Völk., sec. 63), and Hall (6th ed., by Atlay, pt. 1, cap. ii., p. 57), affirming that the surrender of fugitives from justice is a matter of imperfect obligation only, which needs a special convention between the States to give it the force of an international law. Hall says (*loc. cit.*) "Authority is much divided on the matter; but there appears on the whole to be a distinct preponderance of opinion against the existence of the right, and the weight of argument unquestionably leans in the same direction. Sometimes it is said that crimes, or at least the more serious crimes, are not merely an infraction of a command which a particular society chooses to give; they sap the foundations of social life, they are an outrage upon humanity at large, and all human beings, therefore, ought to contribute to repress them. More often it is said that all nations have a common interest in the repression of crime, that its commission is encouraged when a criminal enjoys immunity so soon as he leaves the territory of his country, and that in order to secure reciprocity States must give up criminals at the demand of their neighbours. The latter views are just, but it is difficult to connect them with the duty of extradition. . . . Surrender, apart from convention, has been unusual, and when effected, it has been treated as an act of comity. . . . Positive international law, therefore, does not recognise the *duty* of extradition." It may be said that the opinion thus expressed by Hall is the one that seems to underlie the modern English practice in such cases. (See Forsyth, Cases and Opinions, p. 369, and the despatch of Earl Russell to Mr. Adams, 12th June, 1862, U. S. Dipl. Cor., 1862, p. 111.)

The American practice in such cases has not been uniform, but the opinion preponderant now in the United States

is that obligation to surrender must arise out of treaty. So far as Canada is concerned we believe that the Quebec case of *Rex* v. *Ball*, decided by Reid, C.J., and cited above, would not be followed now in the absence of a treaty or convention. In the case of *In re John Anderson* (1860, 11 U. C. C. P. at p. 61), Richards, J., said: "It seems to be generally conceded that unless there are treaty stipulations to that effect, one nation is not bound to deliver to another fugitives from justice seeking refuge in the territories of such power." While, in view of the diverse opinions we have here cited, the learned Judge overstated the *concurrence* of authority in respect of the doctrine which he accepted, there is at least no doubt of the *preponderance* of authority in its support. See also the case of *R.* v. *Tubbee* (1 U. C. P. R. 98), where it was held that the extradition treaty contains the whole law of surrender as between Canada and the United States.

Leaving the general consideration of the surrender of persons charged with the commission of offences against law, we will briefly examine the doctrine of international law as applied to what are styled "political" offences. Hawkins, J., in *Castioni's* case (1891), 1 Q. B. at p. 165, asks the pertinent question: "Now, what is the meaning of crime of a political character?" After admitting the difficulty of finding an entirely satisfactory definition, the learned Judge observed that he looked upon Sir James Fitzjames Stephen's interpretation of the term as used in the Extradition Act (Hist. Crim. Law, vol. ii., pp. 70, 71), as a sufficient answer to the question, viz.: "It ought to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances." But the definition by Cave, J., in *Meunier's* case is much more exact. He says (1894, 2 Q. B. at p. 419):—"It appears to me that, in order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the government of their choice on the other; and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not." The prisoner in the case last mentioned was charged with committing anarchist outrages in France, by causing explosions at a café and elsewhere. Applying his definition to the case, Cave, J., observed: "In the present case there are not two parties in the State, each seeking to impose the government

of their own choice to the other; for the party with whom the accused is identified by the evidence, and by his own voluntary statement, namely, the party of anarchy, is the enemy of all governments. Their efforts are directed primarily against the general body of citizens." (Cf. the American case, *In re Ezeta*, 62 Fed. Rep. 972.)

The French Revolution, the parent of so much of what has been called "upstart doctrine," is responsible for the first appearance of the term "political offence" in the theory and practice of international law. Oppenheim (Intern. Law. (Peace) vol. 1, p. 389), affirms that down to that period the surrender of offenders was practised on the ground of comity, without any discrimination being made between crimes that would to-day qualify as political offences and those that would not. Art. 120 of the French Constitution of 1793, granted the right of asylum to foreigners exiled from their homes "for the cause of liberty." Napoleon, however, thought it not inconsistent with this declaration, to demand, in the year 1802, that the British government should "remove out of the British dominions all the French princes and their adherents, together with the bishops and other individuals, whose political principles and conduct must necessarily occasion great jealousy to the French Government." Lord Hawkesbury replied that so long as foreigners conformed to the English laws and abstained from all acts hostile to the government of any country with which His Majesty was at peace, "His Majesty would feel it inconsistent with his dignity, with his honour, and with the common laws of hospitality, to deprive them of that protection which individuals, resident in his own dominions, can only forfeit by their own misconduct." (See May's Const. Hist. Eng. vol. iii., ch. xi.) In 1816 Lord Castlereagh declared that the law ought not to be used for the purpose of inflicting punishment on foreigners who were guilty only of "political crimes" committed abroad.

Surveying the whole field of authority, we think it may be predicated as a principle of international law that there is no obligation upon any State to surrender a fugitive political offender. On the other hand to maintain that the fugitive has a *right* of asylum enforceable against the government of the country in which he has sought refuge, is to controvert the sovereign right of control over citizens and strangers inherent in every free State. (See observations on

the *Savarkar* case, *ante*, p. 786; and cf. Oppenheim, *op. cit.* p. 371 *et seq.*) To the publicist it is elementary doctrine that a free and independent State can refuse the hospitality of its domain to any, or to all, foreigners attempting to enter the same. It is true, as Hall points out (*op. cit.* pt. ii. ch. iv.), that the indiscriminate exercise of this right would be to withdraw from the brotherhood of civilised peoples. Modern society, with its complex life overriding international barriers and knitting together in interest the citizens of different States, demands that if the right be not ignored, at least the exercise of it should be reduced to a minimum as regards aliens of good repute. But such considerations in no manner oppugn the free exercise of the right to deport, or extradite *ex comitate*, foreigners who are fugitives from justice, or who are otherwise to be ranked in the category of "undesirables."

* * * *

HALL-MARK ON FOREIGN PLATE.—The case of *Fabergé* v. *Goldsmith's Company*, decided by Parker, J., in the Chancery Division on November 21st (130 Law Times, p. 81), is of value as involving the interpretation of the Imperial Customs Act, 5 & 6 Vict. ch. 47, sec. 59. The plaintiff had for a long period of years carried on in St. Petersburg, Russia, the business of designing and manufacturing articles of jewelry, &c., inlaid with enamel or set with precious stones on a foundation of gold or silver. There was a branch of the plaintiff's business in London, and on the 11th July, 1908, several of the articles mentioned arrived in England for delivery at the London branch. They were seized by the Customs authorities and handed over to the defendants, who alleged that they were articles of gold and silver plate within the meaning of the said section of the Customs Act and other statutes regulating the assaying, stamping and marking of gold or silver plate imported into the United Kingdom, and that they required to be hall-marked before they could be legally sold there. The plaintiff sought a declaration that the articles so seized were not amenable to the provisions of the enactments in question, and that he was entitled to delivery up of such articles. Parker, J., held that the defendants' contention must prevail, and that the goods

must be assayed and hall-marked before being offered for sale in the United Kingdom.

* * * *

THE MONSTROUS REGIMENT OF WOMEN.—When Schiller wrote:—

Ehret die Frauen! sie fletchen und weben
Himmlische Rosen ins irdische Leben,

he was in no wise contemplating with prophetic vision that interesting specimen of twentieth century femininity—the "Suffragette." No such business, indeed, as wreathing "roses of heaven round life's earthly path" for these latter-day Erinnyes! The rather do they find their vocation in assaulting prime ministers and wrecking the houses of public men who refuse to give ear to their hysterical demands. Alas! and alas! for England, with her noble traditions of womanhood dragged through the street brawl and carried off in the police patrol. And the very fact that prosecutions against these deliberate and systematic law-breakers are stifled by an opportunist Home Secretary makes the task of disbanding this "monstrous regiment of woman" all the more difficult. Sir Alfred de Rutzen did, indeed, expostulate in the Bow street Police Court at the way justice was being trifled with by the political authorities, but his remonstrance was much too timid to serve any purpose. What is needed at this juncture is a Judge with the intrepidity of Lord Holt who, instead of brooking any interference by the political authorites with his administration of justice, boldly ordered the Speaker of the House of Commons out of his Court on pain of commitment for contempt if he persisted in his intrusion.

CHARLES MORSE.

THE ACQUISITION AND RETENTION OF CLIENTS.

When I was first invited to deliver an address to you on this subject, it occurred to me that there were only two men who could satisfactorily fill the requirements in giving such an address as this. One was a man who had in the full flush of professional success voluntarily retired from practice, having accumulated a fortune, or for some other cause personal to himself; the other a lawyer who had died in the full practice of his profession. The latter could not very well come here; the former are often reluctant (especially when they have retired to the bench) to tell how they achieved success, or to give directions to young men for imitation. It is a difficult subject to handle, because it is very largely personal to the speaker. If the speaker gives you mere abstract generalities, his talk is but husks. "Be good and be happy" does not help an aspiring lawyer very much. You have got to see how you can be good, how you can be happy. The question with every young lawyer is, how did you get the practice? "After thirty or forty years," he says, "you have got a practice." Did you have a "pull" when you started? Did you have a father who was an eminent lawyer and took you into partnership? Did you have a number of strong friends who placed business into your hands, notwithstanding your inexperience? Or did you start absolutely without friends, without influence, without pressure behind you to bring practice to you?" The answer to such questions, however admirable it may be from the standpoint of a practitioner, cannot fit all men. It may fit some. It may fit some who are strangers in a strange city. It may fit others who have numerous friends. What may apply to one may not apply to the other. Therefore it is for each of you to pick out from what I have to say this evening what may be applicable to your own circumstances.

I think it would not be inappropriate if I speak frankly, and if, not in an egotistical sense, I draw lessons in considerable parts from my own experience, which may prove applicable in the coming years to yours. It is first necessary, in order to give you some light on present conditions, to say what the conditions were when I was admitted to the Bar just thirty-one years ago. In 1874 there were no telephones;

nor were there typewriters; there were no stenographers; there were no district messengers to call. There were none of the facilities that you have in handling practice to-day. When a client wanted to get your advice he had to come to your office, no matter how distant it was. When you wrote your clients a letter or gave a written opinion, you had to write it out in handwriting, or your clerk had to write it out for you. Telephones were used first in the early part of 1870; typewriters about 1882-3-4; they were not in very general use until after 1885. An office stenographer was a luxury that very few of us could afford. I recall one firm in 1874 or 1875 that had one well-paid stenographer. In those days, moreover, there were no trust companies to absorb business as administrators, executors, guardians or conservators. There were no casualty companies to insure employers against liability. A number of other methods are taking practice in these days that went to lawyers in those days. So that many of the doors that were open to us younger lawyers in those days are closed now. Yet while you close one door you open another. The great corporations, such as the railroads, the title and trust companies, the banks, the manufacturing concerns, the trusts, had no such legal staffs as they have to-day. You will find in some of the large corporations a staff of from three to ten or fifteen lawyers, most of them at very fair salaries. That door has now been opened to the young lawyers. At that time it was usual for a young lawyer to go into an office, either without pay, or at merely nominal pay, in order to study law while he was getting himself ready for the Bar. Or, if he had been admitted to the Bar, he could make an arrangement to receive a certain small salary and at the same time be permitted to work up his own clientage. That is now, I think, rather rare. Wherever you can make that arrangement with a good lawyer, it is a most advantageous one, in my opinion, for the young lawyer. But I apprehend that nowadays, usually, you must make up your mind to one of two courses; either to start out for yourself, alone or in partnership with some other lawyer, or to go as a clerk into a law firm.

But before I come to the consideration of that problem, I wish to lay down some propositions as to the essentials of a lawyer—the qualities he ought to have when he starts out.

I think the first one is sound health. You may just as well make up your mind at the beginning, gentlemen, that unless you have sound physical health you cannot endure the strain of a law practice. Whether that strain comes as a trial lawyer, or whether it comes in the sometimes more exacting work of the office, or of preparation for the trial, at any rate the strain that is put upon you time and again requires steady nerves and sound physical condition. If you have not got that and you cannot get it, seek some other employment; for your career will be full of bitterness and disappointment. I have seen it illustrated too often not to warn the young man at the beginning.

A good education is absolutely necessary—much more than it was a generation ago. At that time an academic education was not as common as it is now, and requirements were not as strict. The requirements that were looked for in the lawyers were not as great as they are now. Therefore, you must have the essential foundation which the academic education gives you. If you do not get it in college, you must spend a great deal of hard work in the endeavour to make up for the lack of it. I speak of it from personal experience in struggling to make up those deficiencies. I did not even finish the grammar school. I left school at twelve years of age to begin business, and what education I got after that was casual. I therefore realised how very hard I have had to work to make up deficiencies, and I do not claim to have made them up more than in part. I feel that the years that a young man can spend in acquiring a thorough sound education are never ill-spent. They will give him usury on the time that he puts into them.

Another thing that a young lawyer needs is character. Character is a very elusive sort of thing. It may be what your reputation is, or it may not be. Character which you get from the public may be one thing, and your real character may be something else. But what you want is a real character, which impresses the people that you come in contact with, and makes an older man say, "That is a likely young man, I like that young man. That young man has some character about him." That sums up a great deal; it means courage; it means firmness; it means having his own opinion about things. It makes that impression upon the clients and the people that you want to be your clients, and those that you want to have for your friends. That char-

acter, in part you have to make. You have it, of course when you start; but you have still to make it as you go along —by your experience, your observation, your reading, your conduct with men.

Honesty, I need hardly mention, because it is absolutely essential—in spite of the fact that the dishonest rogue does once in a while succeed. Yet, as between man and man, the honest man is the one that wins in the long run. It is the honest lawyer who gets the confidence of his clients; and that begets the confidence of the community. Being one day in Court, after I had been practising two or three years, I noticed the deference with which an elderly lawyer was treated by the Judge—a Judge who was usually very severe, and raked the lawyers fore and aft. As I observed this old lawyer arguing the case, I thought I could do it better than he was doing. He did not seem to know how to conduct it. He did not know what to do with his witnesses. He fumbled, hemmed and hawed and did not express himself with fluency. But he won his case in the end. I made some inquiry about him. I found that that man's integrity was so well established and he was known so well for straightforwardness with clients, that the Bar and the Bench respected him, and he enjoyed the emoluments of a high reputation without having either the fluency or the skill which other lawyers possess. One of the most eloquent lawyers that we have ever had at this Bar, but a man utterly without moral character, spoke to us once, in the old days at this law school, when he was so under the influence of liquor that he could hardly stand. "Gentlemen," he said, "I am a living example that eloquence alone cannot make character in a lawyer," and he went on, as he tottered on the platform, "Resist temptation. Resist when it first comes to you. Resist when it second comes to you. Then the time surely comes when you will not have to resist." I never had such a lesson, nor did any of us.

Industry is essential, of course. Young lawyers are apt to think they are not advanced fast enough. They feel they are doing hard work, and that it ought to receive more appreciation. Now all I can say to you on that is that you cannot succeed in the law without the very hardest of work. We have all worked hard before you. We have worked when it seemed well nigh hopeless. We have all known the times when everything seemed dark, though we have been at it for

years, and worked and worked and worked, until there seemed to be no end to the work and the worry and the anxiety, and we were ready to give up. And yet the day and the dawn and the brightness finally came. It is that very work that gives you your skill as a lawyer. The labour has to be undergone to prepare you for things that are to come.

Another matter of supreme importance, gentlemen, is tact. I cannot put it ahead of honesty, to be sure, nor of sound health, nor of character; but it is very important. As a help to put yourself before the public, before your friends, before your would-be clients, the Judges, and the lawyers, tact is one of the essentials. Tact (without knowing what the dictionary says about it) is saying the right thing at the right time, and not the right thing at the wrong time or the wrong thing at the right time. It is not hurting anybody else's feelings unless you have got to hurt their feelings. It is the ingratiating yourself into the good will of other people —just as the charming hostess, when she receives a multitude of people, some of whom she does not like, and some of whom she may detest, receives them all, not to the expert eye alike, but apparently alike, so that those whom she may dislike cannot see that she dislikes them. I am going to read you something from Hamlet. The wisest things that Shakespeare says he puts into the mouths of fools. Perhaps it was a part of wisdom and caution in those days when they were nailing peoples' ears to posts for libel. With little alteration the advice of old Polonius to his son Laertes, as he starts off to foreign countries, will fit the young lawyer to the dot:—

"These few precepts in thy memory:
Look thou character. Give thy thoughts no tongue,
Nor any unproportioned thought this act.
Be thou familiar, but by no means vulgar:
The friends thou hast, and their adoption tried,
Grapple them to thy soul with hoops of steel;
But do not dull thy palm with entertainment
Of each new-hatch'd, unfledged comrade: Beware
Of entrance to a quarrel; but, being in
Bear it, that the opposed may beware of thee:
Give every man thy ear, but few thy voice:
Take each man's censure, but reserve thy judgment:
Costly thy habit as thy purse can buy,
But not expressed in fancy; rich, not gaudy;
For the apparel oft proclaims the man.
And they in France of the best rank and station,
Are most select and generous in that:
"Neither a borrower nor a lender be,

For loan oft loses both itself and friend,
And borrowing dulls the edge of husbandry.
This above all: To thine own self be true;
And it must follow as the night the day,
That thou canst not be then false to any man."

"Beware of entrance to a quarrel." What is the good lawyer? He is exceedingly cautious how he enters upon a legal contest. Be very careful about putting your clients into litigation. But when they are in it, gentlemen, bear yourself so that your adversary may fear you and respect you.

"Take each man's censure; but reserve thy judgment." Listen to all that can be said to you by your clients on a case; do not disclose your thoughts at first blush. Wait until you have had the story, and then deliberate over it. Speak deliberately.

And do not run in debt. There are very few of us that can follow that advice. I could not when I came to the Bar. I think there was a time in my life when my creditors were as numerous as Lincoln said that brigadier-generals were during the war. Somebody asked him if he knew whether there were any brigadier-generals in Washington. Lincoln replied that if the inquirer would throw a stone at any yellow dog in the street he would be sure to hit a brigadier-general. In my case, I went into debt to secure my legal education. It is upon this rock of debt that most of us lawyers split. We go to shipwreck upon it. Some of us seem never to be able to get out of debt—debts incurred through heedlessness and thoughtlessness. An old lawyer once said to me, when I asked him what rules he would give to a young man entering the practice, "I have just two. One is never to touch a drop of intoxicating liquor; and the other is, never to run into debt." Those were his two failings. He drew the lesson of life from his own failings. And I have realised that lesson as I have seen young lawyers struggling against a mountain of debt, sometimes heedlessly entered into.

But now to my main subject. When you have come to the Bar, and are going to begin, how will you begin? Will you go out for yourself, or in partnership with another young lawyer, or enter as clerk into another's law office? I have no hesitation in advising a young lawyer to go into a law office as a clerk. I would not advise him to go into a large law office, where he would be lost. But a law office clerkship should be the starting point: and, in my judgment, if

there is any luck in a lawyer's career, it is just at that particular point. There is an element of luck in every man's life. I do not care how industrious he is, how temperate, how honest, how thrifty, how saving, how abstemious, there is somewhere an element of luck. In my judgment, it is when he starts that the luck affects him. I know men, young men, who started wrong and never got right; and I know of others who, by being started right, were kept right. I know a certain lawyer, who has now a practice of probably ten thousand dollars a year—a bluff, hearty, offhand fellow. I said to him, "John, how did you get your practice?" "Made it myself," he said; "never inherited a bit of it." He seemed to think I thought he had inherited it. "How did you get it?" "I was honest with my clients." "Was that all?" "I worked night and day, night and day." "Is that all?" "Well, when a client came in with a case, and I didn't think he had a cause I told him so." "Was that all?" "Yes, I think so." "Whom did you start with?" "Well, such a man—" I said, "John, was he not the best common-law lawyer at the Bar?" "Yes." "Who was his partner?" "Such a man—" Was he not the ablest real estate lawyer we had, one of the squarest men?" "Yes." "Who was the junior member? Did he not have a very fine practice among the Germans? A man of square dealings?" "Yes." "Was there no luck about your getting into that office?" "Now you speak about it I recall that I thought that I was extremely lucky in getting into that office, and those men did help me and did give me advice, and the way they practised is the way that started me straight." I said, "John, it was your luck." Gentlemen, none of us make ourselves. It is the veriest rot on God's earth to tell me that a man is a self-made man. Who makes us? Our friends make us. It is the men and women that we come in contact with that make us. We take our cue from them. Who are they? If they are responsible, if they are high-minded, if they have a standing in the community, if they are looked up to, then we get their reflected lustre. We are pushed on by them. We get a good word from them, and it makes us. Perhaps we go with them and go right, or perhaps we go the other way. We are done or undone by them. Now it is that consideration which the young lawyer has to keep in mind. He may start wrong at that particular spot. When you look for a position in an office, do not go into the office of a man who

has a shady reputation. Go in with a man of more moderate ability, if it is necessary, who has an honourable standing with the members of the Bar and with the Bench, and then you will get started straight.

The ideal place for a young lawyer is in one of two or three places. One of these is the office of a lawyer of perhaps middle age, who has too much to do for himself, does not want to take a partner, but wants a helpful young man who will be honest with him and not steal his practice. That is what the older lawyers are all afraid of, that the young lawyer will run off with the business. It is not so easy to do this; but they are afraid of it. And so, though they cannot do the work alone, they are often afraid to take in a partner. If the young lawyer makes himself useful, if there is any personality in him, there is a prospect of a heritage of business. When the old lawyer steps out, some of his clients will go to the young man, and many who do not will say a very good word for him.

Or he may enter the office of a firm of two or three, who are overburdened with work. Perhaps they throw upon you work heavier than you are able to bear. But that is what you want, lots of work and responsibility; because the sense of responsibility, and the carrying of responsibility, are what make you a good lawyer. You have got to have independence of thought and of judgment, in order to be a good lawyer; and the sooner you begin your training on that line, the sooner you will be standing on your feet. The older lawyers will notice it on every side—more than you have any conception of. While you are thinking that no progress is being made, they are watching you and seeing you and taking your measure.

I would have no hesitation about beginning as clerk in an office. In addition to an immediate compensation that will suffice to support you modestly, you get experience. You get experience from the things you have to do and from your observation of how the older lawyers do the work. You may be in your own office ten years and not see how certain things are done. There is a great deal of truth in what the city comptroller said to me two or three years ago: "This town is more than full of young lawyers who don't know how to get cases into Court, and don't know what to do when they get then into Court, and don't know how to get them out of Court when they have them there." You

must follow the experience of the older men. You must ask their advice. This you can not get when you are seeking to practice alone; and the beginnings are thus very much more discouraging. Now that sort of thing you ought to do from three to five years. I doubt whether three years would impart the experience. But it is not worth while for you to wait too long. If you see no chance of promotion, make your change to an office where there is some chance of promotion.

Believe that you are going to amount to something. Have some faith in your future, and be able to stand up for yourself. Judge yourself right. If you are too modest and depreciate your own ability too much, you will be measured the same way. If you are too conceited, and your abilities do not come up to your conceit, you will fall even below your real ability in the esteem of others. But when you have realized your character and your ability, it is your duty to assert it on every particular occasion.

If, then, you have to work as long as Jacob worked for Rachel, during those years you ought to acquire a thorough knowledge of the statutes. Get thoroughly familiar with them. I spent the first two years of my practice on them. The young lawyers of to-day do not go enough to the statutes. It is also essential during these years to get a fair knowledge of the Supreme Court decisions and the Appellate Court decisions. What makes the sound lawyer is going to the bottom of every question that he is set to work on. Don't shirk the work. Go to the bottom, until, when you get through, you are satisfied that you can teach the Judge on the Bench the law of that case.

Nineteen times out of twenty you can do it—you can go into Court better prepared than the Judge. Then you will understand what the English lawyer meant, who when he was asked what was the difference between heaven and hell, said, "When I go into Court well prepared in a case, then I am in heaven. When I go into Court ill prepared, then I am in hell." There are always surprises in every case. You cannot always anticipate them; but you need not be afraid about your case when you are prepared. It makes all the differences in the temperament of your mind in the handling of the case whether you have prepared it out of the Court room or prepared it in the Court room.

When your first client comes to you, you should not receive him with a high and mighty air. Be humble—not like Uriah Heep, but be humble and thankful at the same time that the man is willing to trust you with the case. No matter how trifling it may be, do not treat it lightly. Receive your client with respect. Listen to his story from beginning to end. You will secure more credit by being a patient listener than you will by talking. When he leaves the office, you may have said practically nothing, but he will go out and give you the credit for all the wisdom which you do not have. Emory Storrs was one of the wittiest lawyers at the bar, a few years ago. At that time we had on the bench a Judge who had been a justice of the peace. When we were arguing a case before him, he would hesitate. Well, gentlemen, I-ah-I-ah—I am not sure about the law on this. I-ah-I-ah—I really don't know what the law is; but—but-but—I-ah-I, I will have to—I-I-I think I will have to decide this case;" then hem and haw, "I will have to let the Supreme Court decide upon it." There was also another Judge who, no matter what proposition he was confronted with, would straighten up and say, "You need not argue any further, Mr. Loesch. When I was counsel for a certain city at such a time, that same point came up, and I settled it, thirty years ago. You need not argue any further." Mr. Storrs, in speaking about the two Judges said that "if a lawyer only knew all the law that the first Judge didn't know, and all the law that the other one thought he knew, he would be the ——est lawyer on God's earth."

Another thing that tells in your work is accuracy. The accuracy and the promptitude of your work have a very great effect on your client. The first piece of work well done gets his friendship. I often hear lawyers complain about clients' ingratitude. True, many of them are ungrateful. But if we are paid our fees we ought not to ask for gratitude. What you should strive for with the client is an affectionate regard—not gratitude, but such an affection for you that he comes back to you, because of his regard, his interest and a liking for you—his affection for you. Those are the men that stay by you from the beginning. Something like twenty years ago, a little more, twenty-two or twenty-three years ago, a man came to me and asked me to draw up a contract he wanted the next

day. He told me what he wanted. I drew up the contract. When he came back the next day it was ready. I was a struggling young lawyer. I charged him five dollars. I should have charged him at least ten dollars. The fees were not as large then as they are now. I saw a smile on his face; but he paid, very much pleased. Two or three years afterwards (I had never seen the man in the meantime) he came back and said, "Mr. Loesch," dumping down a lot of papers, "I am going to close a contract to-morrow at three o'clock. These papers must be examined by that time. My option expires then." I looked over the papers and said, "I don't know whether I can finish it or not." "Well," he said, "you must try," I went home and worked until two o'clock in the morning. Then I went to bed, having set the alarm clock. I got up at four o'clock. I worked until two o'clock next day, and then came downtown. He found the contract ready; and he closed the transaction. I received a fee of $250. He paid it very cheerfully and has been a constant client from that day until this. There has not been a year when he has not paid me several hundred dollars, sometimes three or four thousand dollars. Now that grew out of a five dollar fee. He saw that I took an interest in the case—he saw the promptitude and the zeal with which the work was done, and it made a permanent client of him.

Here is another instance which happened twenty-two or twenty-three years ago. A man came to me with a little piece of work, sent by an older lawyer who had not time to do it. I drafted a contract for him and charged him fifteen dollars. He was a stranger in the city, but he was back at my office within three or four days, and asked me to draft another paper for him. I charged him twenty-five dollars. It went from one thing to another, and now I am receiving considerable practice from that source. I got a fee within the last two or three months of several hundred dollars that grew out of that transaction. Business grows and a clientage is acquired by the recommendation of our clients.

During the several years you are on your probation you will need to make acquaintances. You will make very few useful acquaintances, perhaps, but in order to get those you may have to make very many. I do not think joining clubs amounts to very much. But I do think you

should take part in some reform work. There are two reasons for that. It is not only that this will equally give you acquaintances and standing, but (what is more) it will help you to pass over the gloomy days that will be upon you in those years. You will have something to lift you out of yourself. The very best acquaintances I made in the early years when I was helping to defeat the boss of my own ward. Political work of the higher sort brings you in relation with the leading and coming men. The young lawyer is always looked upon with pleasure by old political leaders, even though they cannot draw him to their side. They are very glad to treat him on equal terms, and to give him the best there is. The first thing they try, to be sure, is to seduce him. Make up your mind at the start whether you are going to take an office. If you seek an office, you will be a failure as a lawyer. If you are going to be a lawyer, puts aside the offers that are being dangled in your face. These offers should serve merely to shew that you are getting some consideration.

During those same years, gentlemen, there is one particular respect in which you must begin to lay the foundation for old age. Lord Romilly said that the unhappiest sight he had ever seen was the old lawyer who has ceased to read. During those years make your acquaintance with good literature. Read the literature of the lawyers. Read the lives of those great lawyers and Judges of England. Read the literature of human nature. The lawyers can gain many points by reading.

To my mind Balzac is the greatest judge of human nature after Shakespeare. I think I learned more of human nature (outside of my own experience) from Balzac than I have from any other author except Shakespeare. I recall especially "Eugene Grandet," the history of a miser. I have read that book two or three times, and this is how it profited me afterwards. I was retained in a very serious case of fraud. I studied the party on the other side. I made up my mind that if ever there was a miser out of the pages of literature, this was the man, and that Grandet was his literary father-in-law. I studied "Eugene Grandet" again, and then I attacked that opponent. It was an eight years' task. But the image of Grandet helped me to hound that man so that at the end of eight years there was not anything left but his hide. The greatest admirer of the

work I did is that man's own lawyer; but he will not give me credit for having any legal acumen. He maintains that I knew all the facts beforehand. Yet the truth of the matter was that I did not; I drew the bill before I had the facts. I merely judged the man's character from what I had read of "Eugene Grandet." That experience was to me a life lesson.

Let me allude also to another case, one that nearly broke me down with the mental and physical strain. I had bought every book I could find on that particular subject. I had a year to prepare for the actual trial of the case. There were very eminent lawyers on the other side, I will not mention names, for the parties are living. But I did not receive from all these books as much light as I did from a certain classical novel, one that characterized exactly the plaintiff's object and put that party in the limelight. With that aid I was able to follow all the ins and outs of his manœuvres, and finally to win the case. It was a work of fiction that guided me to a right solution of that person's character, and a knowledge of his character that was essential to victory.

Still another lesson I now recall which I learned from reading—a lesson I will never forget. I refer to a gentleman by the name of Gil Blas. Gil had various and sundry adventures, and among others he was made secretary to the archbishop of Toledo. The archbishop said to him one day, "Gil, I look upon you as a very likely young man; I like your intelligence and your acumen. Now I am getting old. I have to preach once a month. Make it your duty to let me know when you see any failing signs in my mental powers. I will trust you as a friend to tell me about it." So Gil noted the character of the sermon next month. Then he heard the ensuing sermon; and he thought the archbishop shewed signs of age and senility. At the third sermon he was more satisfied of this, and the fourth was shockingly significant. He complimented the archbishop on the first sermon, and spoke fairly of the second, but of the others he did not. The archbishop asked, "Now, Gil, what is the truth?" Gil said: "Your eminence, your mental powers are failing rapidly." "Gil," responded the archbishop, "I find that I am mistaken in your acumen. The treasurer will pay you and you will leave the house." I have never forgotten the moral of that story. Such incidents of literature add to your knowledge.

Coming now to another matter resting much on a knowledge of human nature, I may refer to the lawyer's charges. I think that every lawyer will say that that is the most difficult thing he has to deal with. We have no bill of costs here as they have in Canada, Germany and England, and therefore every lawyer has to judge for himself what his services are worth. That is the rock upon which a great many lawyers split. They charge either too much or too little. Of course, what you should try to do is to charge the happy mean. But remember that it is better to undercharge than to overcharge. You may be doing yourself a wrong, but it is better to get a reputation for reasonable charge than for unreasonable charges, for the unreasonable charges may drive the client away, while the reasonable charge may bring him back again. It is a useful thing to argue with your client and shew him what is his due. Considerate treatment makes him feel that you have an interest in him personally, and not in his pocket-book.

Beware of unfair rivalry in the business. In these day of warm competition, you are often tempted to forget the proprieties. I was going down Dearborn avenue some years ago and I met a leading lawyer who seemed to be in low spirits. I said, "What is the matter with you this morning?" "I was just thinking," he replied, "how mean some men are in our profession. An honest and successful lawyer who has a very fine practice, has just stooped to a mean trick at my expense. A client of mine, a very rich man, died; the notice of his death appeared in the paper; he left a considerable estate. But I got no notice to take care of it, and I was much puzzled. Of course it was not for me to offer my services. But a few weeks after the death I was at Graceland cemetery, and by accident I came to the grave of this former client of mine. There I saw a number of floral decorations which had been placed about the coffin; and the greatest and largest piece had the professional card of this particular lawyer attached to it. On sending over to the Probate Court, moreover, I found the man had charged it to the estate." The sequel was that the lawyer that sent that floral decoration was afterwards sent to the penitentiary. I shall not deduce from that that every lawyer who gives a large floral decoration to a rich man's widow is going to be sent to the penitentiary. But I do warn you against that method of getting practice. I preach to you

here that the only sure way of advancement is a close application to any and all legitimate professional work. The rest will take care of itself. Each piece of honest professional work breeds more clients. As an illustration of that, of how clients come to you from sources which you did not seek and could not have expected, and come because of your honest work in what has been confided to you, let me add one more illustration from my own experience, twenty-five or twenty-six years ago. I was junior partner to an old lawyer here, and there had been a foreclosure on a railway mortgage. The papers had all passed and were sent here to my partner to look over for record. It is my habit never to put an instrument upon record without seeing whether the instrument is in all respects duly executed. After his perusal of this document it was handed to me for record. I discovered a very serious omission, and I called his attention to it. He wrote a letter to the eastern counsel calling his attention to it. Of course it made a commotion at the head office; for seven or eight attorneys had passed by these slips without noticing them. The paper was corrected and sent on here. The story that follows was told to me afterwards, and I do not tell it to you in an egotistical sense, but simply as an illustration and a lesson. The eastern counsel of this important railroad was much impressed by the fact that so slight an error should have been discovered by the Chicago attorneys, and he came to Chicago to ascertain who it was that had found it out. How he did find out the discoverer of the error I do not know; but certainly not from me. Three or four years passed and my partner died. The railroad business that had been in his hands was given to other lawyers. Two or three months afterwards I received a telegram from the east asking me to come there to the railroad office. I went down and the chief counsel said, "Mr. Loesch, we have decided that we can make use of your services. We had handed our business over to other lawyers in your region, but we are now satisfied that you are the one we want, and it is only a question of compensation if you are willing to take the work." The compensation was fixed to our mutual satisfaction. That was the way in which I became the attorney for the Pennsylvania company. The eastern counsel told me the whole story afterwards, and said, "Ever since that error in the papers I determined to keep track of you. After your partner had died, and other

officers had caused the new lawyers to be appointed, I determined that if the other lawyers did not do their work satisfactorily I would turn to you. I watched the opportunity; the opportunity came. You were sent for. That is all there is to it." My story illustrates that it is impossible to tell how a lawyer's good work is going to make clients, but he may be perfectly certain that it will strike somewhere and some time.

There is another thing—something that brings such misery that it seems I must speak of it. It is the debts or incidental money that the lawyer collects for his clients. When you collect money for your client, pay him the money the same day, or at least the next day or as soon as possible. That is the rule that I have adopted, simply because I have seen in my younger days the misery that is caused by other men using their clients' money. The moment you get money pay it to your client. Pay it over. If you keep it in your hands, see that it is kept entire and not touched. If you are hard up, borrow money but don't use your clients' money. Then you avoid all temptation. They have meant well when they used their clients' money; but then the client called for it and they could not pay it back on the instant; then came lies, then perjury, then defalcation and embezzlement, dishonour and death. How many have gone that way; and it is in carelessness about collections that the first false step is generally taken.

There is one other thought to remember, gentlemen, and that is that when you begin your practice it is to be for a lifetime. It is not with the expectation of making money quickly. It is going to be years. You may be fifteen years getting on your feet. To be sure, you have got fifteen or twenty profitable years after that. But your profitable years will come only after you are forty or forty-five. You will then earn the rewards for the work you have done. You will be favoured with your clients. No man is so happy as the professional man who stands well in his profession, knowing that he has earned all that he has got in reputation or in money. Build for that thirty or forty years and you will build firmly.

But do not forget that you can build but slowly. The first year I practised my receipts were $273. The second year I received $400. The third year I received $460. The fourth year it was $720. In a year or two more it was

$1,800; the next year $2,100; the next year $2,200; the next year $3,300. That was about ten years from the time I began. Then it reached $4,000, then $4,500, then $5,000, then $6,000, then $7,000, then $10,000; and I am not going any further this evening.

FRANK J. LOESCH.

CAN A COMPANY BE "RESPECTABLE"?

The decision of the English Court of Appeal in *Willmott* v. *London Road Car Co.* (Times 14th Oct.) restores companies to the list of "respectable and responsible persons" to whom leases may properly be assigned, and gives the company in each particular case the opportunity of proving that it is in fact respectable and responsible. Apart from the decision of Romer, J., in *Harrison, Ainslie & Co.* v. *Corporation of Barrow-in-Furness,* 39 W. R. 250, it would, perhaps, have been difficult to raise any question on the point, and that decision really states no reasons. A lease of land, with an iron furnace and mill, and certain water rights for the purpose of working the mill, contained a covenant on the part of the lessees not to assign or underlet the same without the previous consent in writing of the lessors, but such consent was not to be unreasonably refused, or refused to "a person of responsibility and respectability." This proviso joined both forms which are in common use, and left the lessees at liberty to assign the lease without consent either if the consent was unreasonably refused, or if it was refused in the case of a person of responsibility and respectability. Romer, J., held that the lessors were entitled on both grounds to refuse to consent to the assignment of the lease to the Barrow Corporation. He took the question of responsibility and respectability first. "No doubt," he said, "for many purposes the word "person" includes a corporation, as, for example, for the purposes of the Conveyancing Act, 1881. But looking at the particular lease, I have to decide whether the corporation

of Barrow-in-Furness falls within the definition of "a person of responsibility and respectability." I think not. The corporation cannot under the terms of the lease, and in view of the facts, be said to come within the fair meaning of these words." But no reason for this conclusion was suggested. The learned Judge went on to consider whether the consent was unreasonably withheld, and he answered this also against the corporation. The corporation had agreed not to use the water rights included in the lease, and hence they could not work the mill as contemplated by the lease.

But the consideration just mentioned, though it was doubtless relevant with regard to the refusal of consent being reasonable, had nothing to do with the question whether the corporation was "a person of responsibility and respectability." Nor is it easy to see how the terms of the particular lease could affect this question. Of course the amount of rent is important in deciding whether a proposed assignee is "responsible." He may be responsible if the rent is £50, but not if it is £500; and when the premises are to be used for a purpose—which renders a company clearly ineligible—as where they are to be used only by a doctor—this may lead to a corresponding restriction in the meaning of the word "person." In this way the terms of the particular lease may exclude a company. But when the premises are to be used for a business, there is nothing in the context to cut down the ordinary meaning of "person." A company can carry on business as well as an individual, and it is no objection, so far as the words in question go, that the company cannot or will not in fact carry on the business. An individual, also, may refuse to carry on the business usually carried on upon the premises, but while this may be a ground for saying that a refusal of consent is reasonable, it does not touch the question of responsibility and respectability. If the lessor wishes to secure the continued use of the premises for a particular purpose, he can do so by express provision.

The decision in *Harrison, Ainslie & Co.* v. *Corporation of Barrow-in-Furness* was followed by Neville, J., in the present case of *Willmott* v. *London Road Car Co.* (*supra*). There the plaintiff in May, 1900, granted a lease of premises for sixty-two years, and the lessee covenanted to use them only for the business of a job-master and livery-stable keeper, and not to assign without consent, but consent was

not to be withheld in respect of a respectable and responsible person. In 1901 the premises were, with the consent of the lessor, assigned to the Road Car Co. In 1909 that company, being on the point of selling their undertaking to the London General Omnibus Co., applied to the lessor for his consent to the assignment of the lease, and this was refused. Subsequently the sale was completed, and the omnibus company went into possession of the premises. The lessor brought the action to recover possession for breach of covenant, and the defendants counterclaimed for a declaration that they were entitled to assign to the omnibus company. Neville, J., followed *Harrison, Ainslie & Co.* v. *Corporation of Barrow-in-Furness* (*supra*), and held that the omnibus company was not a person within the meaning of the proviso. But the Court of Appeal have set aside the subtleties of construction which that case suggests, and have followed the plain meaning of the words. The word "person" includes both natural and artificial persons. This, indeed, is elementary, and under a power to lease to any "person" a lease may be granted to a company: *Re Jeffcock's Trusts* (51 L. J. Ch. 507). There is no reason for restricting the term in a proviso as to assignment. And a company can be both respectable and responsible. The Master of the Rolls pointed out that the right of a company to sue for a libel calculated to injure its business reputation: *South Hetton Coal Co.* v. *North-Eastern News Association* (1894 1 Q. B. 133), implied that it could have a reputation, and could therefore be respectable. And responsibility is a matter which can be predicated of a company just as much as of an individual. Hence the proviso allowing an assignment to a person of responsibility and respectability must be applied in the case of a company in the same manner as an individual. Whether the company can or will use the premises for a particular purpose is not in general material. The user of the premises depends on the other terms of the lease, unless, as already pointed out, the lease is of such a character that the holder of it must necessarily be an individual. In all other cases a company may be the assignee if it in fact satisfies the tests of respectability and responsibility.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW and LORD MERSEY.)

[NOVEMBER 1ST, 1910.

MCFARLAND V. THE BANK OF MONTREAL AND THE ROYAL TRUST COMPANY.*

Canada—Bank—Contract between Banks—Pledge or Sale of Assets—Bank Act (R. S. C.) 1906, ch. 29.

By an agreement made between the Ontario Bank and the Bank of Montreal dated October 13, 1906, it was recited that the directors of the Ontario Bank deemed it necessary and expedient to make immediate provision for payment or taking up of its debts and liabilities, and had applied to the Bank of Montreal for that purpose, and had exhibited to the Bank of Montreal a statement of its assets and liabilities, and that the Bank of Ontario had since carried on its business in the ordinary course. The agreement then provided by clause 2 that "in consideration of the premises, the Bank of Montreal hereby agrees to purchase by way of discount and of rediscount at the rate of 6 per cent. all the call and current loans, and overdue debts of the Ontario Bank existing at the close of business on October 12th, 1906." This clause and the immediately following clauses provided for advances to be made by the Bank of Montreal and the security it was to receive therefor. By clause 9, the Ontario Bank agreed to discontinue business except for the purpose of selling and realising on its assets and for furnishing the money necessary for the payment of its notes in circulation, debts, liabilities, and obligations, including advances owing to the Bank of Montreal. Clause 15 bound the Bank of Montreal to account to the Ontario Bank for any surplus realised from the securities transferred to it under the agreement; and clause 16 provided for the payment by the Bank of Montreal to the Ontario Bank of $150,000 for any

*27 T. L. R. 55.

indirect benefit derived by the Bank of Montreal under the agreement, if the terms and conditions of the agreement were capable of being and were in fact carried out by the Ontario Bank.

Held, that this agreement did not offend against the provisions of the Bank Act (R. S. C.), 1906, ch. 29, and that it was binding.

Decision of the Court of Appeal of Ontario (21, Ontario L. R. 1), affirmed.

This was an appeal from a judgment of the Court of Appeal for Ontario of April 18th last, affirming an order of Mr. Justice Britton.

Mr. Hellmuth, K.C., and *Mr. Glyn Osler* (both of the Canadian Bar) appeared for the appellant; *Mr. Wallace Nesbitt,* K.C., and the *Hon. E. L. Newcombe,* K.C., (both of the Canadian Bar), for the Bank of Montreal, and *Mr. James Bicknell,* K.C., (of the Canadian Bar), for the Royal Trust Company.

The arguments were heard in July before a Board composed of LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW and LORD MERSEY, when judgment was reserved.

LORD MACNAGHTEN, in now delivering their Lordships' judgment, said the appellant, who was a shareholder in the Ontario Bank (now in liquidation), having been placed on the list of contributories, called upon the liquidator to dispute the accounts of the Bank of Montreal, claiming to be a creditor, and, in fact, the only creditor of the Ontario Bank. The claim of the Bank of Montreal amounted to a very large sum. It covered the whole of the liabilities of the Ontario Bank at the time of its suspension. The claim was made up and brought in on the basis of an arrangement between the Ontario Bank and the Bank of Montreal which was embodied in a deed under seal executed on the 15th, but bearing date October 13, 1906. No objection was taken to the form of the application or to the competence of the appellant in his individual capacity to impeach a deed made between the Bank of Montreal and the corporation of which he was a member. The argument at the Bar was confined to the consideration of the meaning and effect of the instrument itself. Was it or was it not

a sale by the Ontario Bank of the whole or part of its assets? If it was a sale then the transaction, as the appellant contended, was *ultra vires* and void. The Bank Act, R. S. C. 1906, chapter 29, authorized the sale by one bank to another of the whole or part of its assets, but it prescribed certain conditions which in this case admittedly had not been complied with, and declared that until those conditions were fulfilled the agreement of sale was "of no force or effect." The Ontario Bank had been incorporated in 1857 by a special Act of the Legislature of the late province of Canada. According to the annual report of 1906 it had a capital of $1,500,000, with a rest of $700,000. Its head office was in Toronto. It had 31 branches in Canada, and it was in good credit with its customers and the public up to October 13, 1906. In the early part of September, 1906, Mr. Pope, the acting chief accountant of the Ontario Bank, reported to the directors serious defalcations on the part of one Charles McGill, the general manager. The position of the bank was found to be critical. Thereupon the directors reopened negotiations with the directors of the Royal Bank who had at one time proposed an amalgamation with the Ontario Bank. The directors of the Royal Bank investigated the affairs of the Ontario Bank and declined to proceed further. Then the directors of the Ontario Bank took counsel with Mr. Coulson, the president of the Canadian Bankers' Association, and the managers of the principal chartered banks in Toronto. On the evening of Friday, October 12, 1906, there was a meeting at the private residence of Mr. Coulson, the general manager of the Bank of Toronto. The president of the Bankers' Association and the managers of the principal banks with the exception of the Bank of Montreal were present. A statement of the assets and liabilities of the Ontario Bank as on September 29 was produced. The meeting lasted from 8 p.m. to 2 a.m. on the following day. All that night the various branches of the Ontario Bank were ringing up Mr. Pope over the telephone "asking for funds, asking for instructions, and asking what they were to do." It was plain that without immediate assistance the Ontario Bank would be unable to open its doors on Saturday morning. No result was arrived at at that meeting. No substantial offer of assistance was made. All present were convinced that their only hope was the Bank of Montreal. No other bank would or could come to

the rescue. The manager of the Bank of Commerce, intimated that he was authorised to say that assistance might be expected from the Bank of Montreal. So a committee was appointed to meet the representatives of the Bank of Montreal, who were to arrive at Toronto very early in the morning. The meeting took place at the King Edward Hotel. Mr. Braithwaite, the manager of the Bank of Montreal at Toronto, confirmed what had been said at the previous meeting by the manager of the Bank of Commerce. "That is no use, Mr. Braithwaite," said Mr. Pope, who appeared to have taken the leading part on behalf of the Ontario Bank. "Can I put 'Bank of Montreal' on the windows and doors of the Ontario Bank?" Mr. Braithwaite said, "Yes, you may." The question was asked twice, and twice the assurance was given. So the name of the Bank of Montreal was put up in all the branches of the Ontario Bank before the bank opened on Saturday, October 13th. The result was that in a large number of the branches the depositors were satisfied at once. In some of the city branches, where the daily papers had circulated all kinds of rumors, there was a run, but the run was met by the Bank of Montreal, which on that day afforded assistance to the amount of about a million dollars. And thus by the courage and promptitude of the managers of the Bank of Montreal and in consequence of the unlimited confidence which the public had in its position the imminent danger of a commercial panic was averted, and an immense service was rendered to the community as well as to the Ontario Bank. Such was the account of the transaction given in the oral evidence. So far there seemed to be no suggestion or hint of a sale or purchase. Of course the Bank of Montreal took up the matter as a business transaction, expecting a fair remuneration for their services. But the transaction as described in the oral evidence was simply a financial operation, unusual and extraordinary no doubt, but not beyond the scope of legitimate banking. In the minutes of the meeting of the directors of the Ontario Bank held at 9 a.m. on October 13, 1906, the transaction was recorded in the following terms: "It was unanimously resolved to ask the Bank of Montreal to re-discount the loans of this bank and to undertake to meet the demands of the depositors and in consideration of its doing so this bank absolutely and unconditionally transfers said loans and all documents

representing or relating to same, including all securities held as collateral, and sells, assigns, and transfers and sets over absolutely all its right, title and interest in all debts and choses in action which it may possess or be entitled to, and agrees to hold same to the Bank of Montreal and authorises the Bank of Montreal to act for and represent the Ontario Bank in reference to same and to receive and grant acquittances for all moneys payable in respect thereof, and the Ontario Bank agrees to guarantee and indemnify the Bank of Montreal in the premises—that is to say, guarantees payment of the debts and obligations so discounted and to indemnify against loss in any way in consequence of having entered into the transaction. It is also resolved and agreed that this bank discontinue the business of banking and permits and authorises the Bank of Montreal to enter its premises and offices wherever situated, and use the same together with its banks and other appliances for the conducting of banking business, also that the members of the staff of the bank may be dismissed and engaged by the Bank of Montreal at any time when the representatives of the Bank of Montreal consider it necessary. It was further unanimously resolved that the president be authorised to execute under the corporate seal of the bank a form of agreement with the Bank of Montreal which was submitted, read, and approved, to carry out the purpose of the above resolution on the details and figures being filled in the blanks thereof."

It would be observed that there was nothing in that resolution pointing to a sale. There was nothing from which it could be inferred that a sale or a purchase was within the contemplation of either party. A second meeting of the board of directors of the Ontario Bank was held on the same day at 4 p.m., at which the minutes of the previous meeting were read and confirmed and Mr. Braithwaite was appointed general manager in the place of McGill who was dismissed. At a meeting of the directors, held on October 15, 1906, the form of agreement referred to in the resolution of October 13, as "completed" was approved and duly executed under the seal of the Bank of Ontario. As already stated it bore date October 13. At a second meeting on the same day it was resolved that the Ontario Bank do suspend payment of its liabilities and that notice

of its suspension be given to the president of the Canadian Bankers' Association who was requested to appoint a curator pursuant to the Bank Act Amendment Act, 1900, and the by-laws of the Canadian Bankers' Association. A curator and an advisory board were accordingly appointed and at a special general meeting of the shareholders of the Ontario Bank held on December 11, 1906, the old directors retired and a new board composed of gentlemen connected with the Bank of Montreal was duly elected. The realization of the assets was carried on by the board of the Ontario Bank in due course, and meetings of the shareholders of the Ontario Bank were regularly held at which full information as to the progress of the liquidation was afforded, and the proceedings substantially approved. On July 15, 1908, an order for the winding-up of the Ontario Bank was made on the petition of the Bank of Montreal as creditor and one Polson a shareholder in the bank. Notice of the proceedings which had given rise to this appeal was given on May 8, 1909. It was not necessary to set forth at length all the clauses of the deed of October 13, 1906, on which the appellant founded his contention or to analyse its provisions. The deed seemed to be quite in conformity with the resolution of the meeting of the directors held on October 13, 1906. In substance it added nothing to the terms of that resolution beyond (1) defining the remuneration of the Bank of Montreal which might or might not have been settled when the Bank of Montreal agreed to take over the outside obligations of the Ontario Bank; and (2) adding a provision for the payment by the Bank of Montreal in a certain event of a sum in respect of the goodwill of the Ontario Bank. The deed of October 13, 1906, began by setting forth a statement of the assets and liabilities of the Ontario Bank as on September 29, 1906, and then, after a guarantee of the accuracy of that statement, declared in clause 2 that: "In consideration of the premises, the Bank of Montreal hereby agrees to purchase by way of discount and of rediscount at the rate of six per cent, (6 p. c.), all the call and current loans and overdue debts of the Ontario Bank existing at the close of business on October 12, A. D. 1906, the amount thereof to be ascertained as soon as possible, it being understood that the Bank of Montreal shall be entitled to the benefit of an immediate transfer of all and every security or securities held for all or any of

such loans and overdue debts." The deed ended by providing (clause 16) that, "If the terms and conditions, of this agreement are capable of being and are, in fact, carried out by the Ontario Bank as and in the manner herein contemplated and agreed, then, for the indirect benefit thereby accruing to the Bank of Montreal, it agrees to pay to the Ontario Bank or to allow and credit on the final adjustment of accounts, the sum of one hundred and fifty thousand dollars $150,000)." The argument on the part of the appellant turned, mainly, on those two clauses. It was said that the use of the word "purchase" in clause 2 shewed that there was a sale of at least part of the assets of the Ontario Bank within the meaning of the Bank Act, and that, at any rate, there was a sale of the goodwill which, in reality, was the only asset the Ontario Bank possessed. It was, however, clear that the Bank of Montreal did not purchase or intend to purchase the call and current loans and overdue debts of the Ontario Bank for its own profit as a matter of bargain. Read in the light of the circumstances in which the deed was made, the expression merely meant that those loans and debts were made over absolutely to the Bank of Montreal as the agents and attorneys of the Ontario Bank for the purpose of discharging that bank's obligations to its outside creditors. It could not be doubted that on the true construction of the deed if there had been any profit on that part of the transaction, which was most improbable, if not impossible, the profit would not have enured to the benefit of the Bank of Montreal. As regarded the payment in respect of goodwill, it was clear that there was no agreement on the part of the Ontario Bank to sell the goodwill or to bind itself to do or to forbear from doing anything in order to secure the goodwill (such as it was) to the Bank of Montreal, though no doubt the Bank of Montreal acquired an indirect benefit by taking upon itself and fulfilling the obligations of the Ontario Bank to its customers and taking over such of the premises of the Ontario Bank as it chose to purchase. On the whole their Lordships agreed with the Courts of Ontario in thinking that the deed of agreement of October 13, 1906, did not offend against the provisions of the Bank Act, and they would humbly advise His Majesty that the appeal must be dismissed. The appellant would pay the costs of the appeal.

The liquidator would have his costs, as well as the Bank of Montreal.

Blake and Redden, solicitors for the appellant.

Bompas, Bischoff and Co., and *Harrison and Powell,* for the respondent.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW and LORD MERSEY.)

[NOVEMBER 1ST, 1910.

THE STANDARD IDEAL COMPANY v. THE STANDARD SANITARY MANUFACTURING COMPANY.*

Canada—Trade-mark—"Standard."

The word "Standard" cannot properly be registered as a trade-mark under the Canadian Trade-mark and Design Act, 1879.

This was an appeal from the judgment of the Court of King's Bench for Quebec, of February 25, 1910, confirming with a slight variation a decision of the Superior Court.

Mr. Shepley, K.C., *Mr. Lafleur,* K.C., and *Mr. C. A. Pope* (all of the Canadian Bar), appeared for the appellants.

Mr. Doherty, K.C., and *Mr. H. J. Trihey* (both of the Canadian Bar), for the respondents.

The arguments were heard in June last before a board composed of LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW and LORD MERSEY, when judgment was reserved.

LORD MACNAGHTEN, in delivering their Lordships' judgment, said the judgment of the Court of King's Bench restrained the Standard Ideal Company—the defendant in the action—"from using the word 'Standard' in connection

* 27 T. L. R. 63.

with enamelled bath-tubs, washstands, lavatories, sinks, laundry trays, and other articles of toilet use and their attachments, either by stamping upon said goods or by circulars, or advertising or otherwise in designating or describing the said particular kinds of wares and from representing to the public that goods, wares, or merchandise manufactured or sold by the said defendant were the goods, wares, or merchandise of the plaintiff." The plaintiff is an American corporation. Its headquarters are in Pittsburg. The defendant is a Canadian company. Its works are situated at Port Hope, Ontario. The declaration in the action alleged that the Standard Sanitary Manufacturing Company was incorporated under the laws of the State of New Jersey on December 26, 1899; that it acquired the goodwill, trademarks, and assets of a company incorporated under the laws of the State of Pennsylvania as the Standard Manufacturing Company; that the Standard Manufacturing Company carried on business throughout the province of Quebec and elsewhere from and after 1890; that the goods of the Standard Manufacturing Company were known by that company's name and trade-mark "Standard;" that the Standard Sanitary Manufacturing Company continued the sale of goods manufactured by the Standard Manufacturing Company throughout the province of Quebec and elsewhere, and used in connection with the goods that name and trademark. The declaration further alleged that on July 21, 1906, the Standard Sanitary Manufacturing Company registered in Canada as a specific trade-mark the said trademark consisting of the word "Standard." The declaration then charged that the defendant, the Standard Ideal Company, had infringed the plaintiff's trade-mark, and was passing off its goods as and for the goods of the plaintiff company. The claim was for an injunction and damages. The defendant denied the charges of infringement and passing off, and further alleged that the word "Standard" was in common use by manufacturers and dealers in various classes of merchandise, and that the name could not, in law, form the subject of a valid or exclusive trade-mark. The defendant also alleged that the plaintiff company was carrying on its business in Quebec in contravention of an Act of the Quebec Legislature and was therefore not entitled to protection from the Courts of that province. The Quebec Act, on which the defendant relied, was the Act

4 Edw. VII., ch. 34. It enacted that no extra-provincial corporation should carry on business in the province of Quebec unless a license under the Act had been granted to it, and unless such license was in force, and that no company, firm, broker, agent, or other person should, as the representative or agent of, or acting in any capacity other than as traveller taking orders for any such extra-provincial corporation, carry on any of its business in the province unless such corporation had received such license and unless such license was in force. The license was granted on certain conditions, one of which was that the applicant must deposit in the Provincial Secretary's office a power of attorney constituting a chief agent in the province for receiving service in any suit or proceeding. The plaintiff company then amended its declaration by alleging that its sales in Montreal and throughout the province were made through an agent acting as a traveller taking orders. At the trial Mr. J. M. Collins deposed that he represented the plaintiff company as sales agent for Canada, travelling and calling on wholesale houses, taking orders, and sending them to Pittsburg. "The goods," he said, "are shipped direct to the customer and the customer pays direct to the company for the goods and we are simply the sales agents, selling the goods as travellers for the company." He added in cross-examination that it was unnecessary to have a show-room in Montreal and that they did not now carry a stock there for the Standard Sanitary Manufacturing Company. That evidence was not contradicted. Their Lordships therefore thought that it must be taken to be established that the plaintiff company was not acting in contravention of the statute, and was not in fact now carrying on business in Quebec, though it employed a traveller to solicit orders in that province. On the question as to the validity of the alleged trade-mark their Lordships were compelled to differ from the Court of King's Bench. The Canadian Trade-Mark and Design Act, 1879, 42 Vict., c. 22, required trade-marks to be registered. It did not, however, contain a definition of trade-marks capable of registration. It provided that: "All marks, names, labels, brands, packages, or other business devices, which are adopted for use by any person in his trade, business, occupation, or calling for the purpose of distinguishing any manufacture, product, or article of any description manufactured, produced, compounded,

packed, or offered for sale by him applied in any manner whatever, either to such manufacture, product, or article, or to any package, parcel, case, box, or other vessel, or receptacle of any description whatsoever containing the same, shall for the purposes of this Act be considered and known as trade-marks." The Act, however, declared that the Minister might refuse to register any trade-mark "if the so-called trade-mark does not contain the essentials necessary to constitute a trade-mark properly speaking." The Act did not define or explain the essentials of a trade-mark, nor did it provide for taking off the register an alleged trade-mark which did not contain the requisite essentials. In applying the Act the Courts in Canada appeared to consider themselves bound or guided mainly by the English law of trade-marks and the decisions of the Courts of the United Kingdom. Now the word "standard" was a common English word. It seemed to be used not unfrequently by manufacturers and merchants in connection with the goods they put upon the market. So used it had no very precise or definite meaning. But obviously it was intended to convey the notion that the goods in connection with which it was used were of high-class or superior quality or acknowledged merit. Without attempting to define "the essentials necessary to constitute a trade-mark properly speaking," it seemed to their Lordships perfectly clear that a common English word having reference to the character and quality of the goods in connection with which it was used and having no reference to anything else could not be an apt or appropriate instrument for distinguishing the goods of one trader from those of another. Distinctiveness was the very essence of a trade-mark. The plaintiff company was therefore not entitled to register the word "standard" as a trade-mark. The result was, in accordance with the decision of the Supreme Court in "*Partlo* v. *Todd*," (17 S. C. R. 196), that the word, though registered, was not a valid trade-mark. The action, so far as it was based on alleged infringement of trade-mark, must fail. There remained the charge of passing-off. On that question also their Lordships were compelled to differ from the Court of King's Bench. The evidence fell short of establishing the proposition that the word "standard" had acquired a secondary signification, and so meant, as applied to articles of toilet use, goods manufactured by the plain-

tiff company. Moreover, there was no proof that any person had ever been deceived by the alleged similarity between the trade designation used by the defendant and that used by the plaintiff, nor was there any probability of deception. The plaintiff was an American company, not carrying on business in the ordinary sense of the term in the province of Quebec; the defendant was a Canadian company trading there. Each proclaimed in its labels and advertisements its headquarters or place of manufacture. The defendant company made the same class of goods as the plaintiff company. It had apparently imitated or copied some of the plaintiff's designs and patterns. It had, undoubtedly, copied many of the plaintiff's advertisements and photographs, as well as the combination of colours adopted by the plaintiff company in its green and gold labels. But this was not an action for infringement of copyright in designs or letterpress. It was an action for infringement of trade-mark and for passing off. The question of trade-mark had been disposed of. As for the charge of passing off, although the defendant company had availed itself unscrupulously, if not unfairly, of the labour, ingenuity, and expenditure of the plaintiff company in preparing the ground and educating the public on sanitary questions and bringing into notice the most fashionable and up-to-date articles of toilet use, it was impossible to come to the conclusion that the trade designation adopted by the defendant company was calculated to deceive or to lead customers to believe that in buying its goods they were buying the goods of the plaintiff company. The defendant company was protected by a high tariff and could afford to undersell the plaintiff company. There seemed to be no reason why it should seek to pass off its goods as the goods of the plaintiff company. Nor was there really any evidence tending to prove that it had ever done so. Their Lordships would, therefore, humbly advise his Majesty that the appeal should be allowed and the action dismissed with costs here and below.

Laurence Jones and Co., solicitors for the appellants.

C. Russell and Co., solicitors for the respondents.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW and LORD MERSEY.)

[NOV. 1ST, 1910.

THE BURRARD POWER COMPANY (LIMITED) AND ANOTHER v. THE KING.*

Canada—Grant of Water Rights—Railway Belt of British Columbia—Rights of Dominion and Province.

Held, that a grant to the appellants of water rights in the Railway Belt of British Columbia by Water Commissioners purporting to act under the provisions of the Water Clauses Consolidation Act, 1897, of British Columbia, was invalid, inasmuch as those rights were vested in the Dominion Government and therefore the Provincial Legislature was precluded from dealing with them.

This was an appeal by special leave from a judgment of the Supreme Court of Canada of February 15, 1910, affirming a decision of the Exchequer Court.

Mr. Lafleur, K.C. (of the Canadian Bar), and *Mr. Hamar Greenwood*, appeared for the appellants.

Hon. E. L. Newcombe, K.C. (of the Canadian Bar), and *Mr. Bateson*, K.C., for the respondent.

The arguments for the appellants—the other side not being called on—were heard in July before a board composed of LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW and LORD MERSEY, when judgment was deferred.

LORD MERSEY, in delivering their Lordship's judgment, said the only question raised upon the appeal was whether certain water rights in the Railway Belt of British Columbia were vested in the Dominion Government so as to preclude the Provincial Legislature from dealing with them. The circumstances in which the dispute had arisen were

* 27 T. L. R. 57.

shortly as follows: The Province of British Columbia was admitted into the Dominion of Canada in 1871 under the provisions of the British North America Act, 1867. The admission was subject to the provisions of that Act and also to certain Articles of Union duly sanctioned by the Parliament of Canada and by the Legislature of British Columbia. The 11th of those articles stipulated that the Dominion Government should secure the construction of railway communication between the railway system of Canada and the seaboard of British Columbia, and that the Government of British Columbia should convey to the Dominion Government, "In trust to be appropriated in such manner as the Dominion Government may deem advisable in the furtherance of the construction of the said railway," certain public lands along the line of railway throughout its entire length in British Columbia. In consideration of the land to be so conveyed in aid of the construction of the said railway the Dominion Government agreed to pay to British Columbia from the date of the union $100,000 per annum. The conveyance contemplated by that part of the 11th Article was effected by subsequent statutes of the Legislature of the province, and the land so conveyed was known as "The Railway Belt." The railway had now been built. By the Water Clauses Consolidation Act, 1897, 61 Vict., chap. 190 (Revised Statutes of British Columbia), section 4, the right to the use of the unrecorded water in any river, lake, or stream was declared to be vested in the Crown in the right of the province, and it was enacted that save in the exercise of any legal right existing at the time of such diversion or appropriation no person should divert or appropriate any water from any river, watercourse, lake, or stream, excepting under the provisions of the Act. By section 5 it was provided that no right to the exclusive use of such water should be acquired by any person by length of use or otherwise than as might be acquired or conferred under the provisions of the Act or of some existing or future Act. By section 2 "water" was declared to mean all rivers and water power not being waters under the exclusive jurisdiction of the Parliament of Canada, and "unrecorded water" was declared to mean all water not held under a record under the Act or under certain repealed

Acts or under special grant by public or private Act, and should include all water for the time being unappropriated or unoccupied or not used for a beneficial purpose. On April 7, 1906, the Water Commissioners for New Westminster, British Columbia, purporting to act under the provisions of that Act, granted to the appellants, the Burrard Power Company (Limited), at an annual rental of $566, a water record for 25,000 inches of water out of the Lilloet lakes and Lilloet river for generating electricity. Those waters are within the railway belt. On December 26, 1906, the Attorney-General for Canada filed an information in the Exchequer Court against the company, claiming a declaration that the record was invalid, and conveyed no interest to the company, and asking that it should be cancelled. The information alleged that the company's works, if carried out, would have the effect of diverting the water of the river, thereby interfering with its navigation, and would otherwise materially diminish the value of the lands of the Dominion Government in the railway belt. In support of the claim, reliance was placed on the agreement contained in the terms of union, and on the provisions of the Acts of the Provincial legislature passed for the purpose of giving effect to that agreement. Reliance was also placed on the provisions of section 91 of the British North America Act, 1867, which declared that the exclusive legislative authority of the Parliament of Canada should extend to all matters coming within certain classes of subjects, including the public debt and property and navigation. It was further submitted that, having regard to sub-section 2 of section 131 of the Water Clauses Consolidation Act, 1897, the grant of the record by the commissioners was not authorised by the Water Clauses Act. After the filing of the information the Attorney-General of British Columbia was added as a party to represent the interests of the province. On December 23, 1907, the determination of the issue of fact was referred to Mr. Justice Archer Martin, who found the facts to be in accordance with the allegations of the Dominion Government. On April 13, 1909, the case came on for argument before Mr. Justice Cassels, and on May 10, that learned Judge declared that the grant of the record of water in question was invalid and conveyed no interest to the defendant company. The judgment proceeded on three grounds; first, that the grant was an interference with property subject to the exclusive

authority of the Dominion of Canada; secondly, that the diversion of water intended to be authorised thereunder would be a very serious interference with the navigability of the river; and thirdly, that the record was not authorised by the provisions of the Water Clauses Act under which it had been granted. From that judgment an appeal was brought to the Supreme Court of Canada, and dismissed on February 15, 1910. Their Lordships were of opinion that the judgments of the Court below were right. The grant by the province of British Columbia of "Public lands" to the Dominion Government undoubtedly passed the water rights incidental to these lands. In the argument addressed to their Lordships that was not really questioned. But it was said that, though the proprietary rights of the province in the lands and in the waters belonging thereto were transferred to the Dominion Government, the legislative powers of the province over the same neither were nor could be parted with, and that therefore it was competent for the Provincial Legislature to enact the Water Clauses Act, 1897, under which the record was granted. In support of that contention a passage was cited from Lord Watson's judgment in the *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1889), 14 App. Cas. 301. Their Lordships were of the opinion that the contention was wrong and that the passage in Lord Watson's judgment afforded no kind of support for it. The object of Article 11 of the terms of union was, on the one hand, to secure the construction of the railway for the benefit of the province, and on the other, to afford the Dominion a means of recouping itself in respect of the liabilities which it might incur in connection with the construction by sales to settlers of the land transferred. To hold that the province after the making of such an agreement remained at liberty to legislate in the sense contended for would be to defeat the whole object of the agreement. for if the province could by legislation take away the water from the land, it could also by legislation resume possession of the land itself: and thereby so derogate from its own grant as to wholly destroy it. Lord Watson's reference in the precious metals case to the 11th Article, so far from supporting the appellant's contention was against it. He said: "the conveyance contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands and to appropriate their revenues." The grant of the water

record in the case now under consideration was an attempt on the part of the province to appropriate the revenues to itself, and would if carried into effect violate the terms of the contract as interpreted by Lord Watson. It was true that Lord Watson added that the land was not by the transfer taken out of the province, and that once it was "settled" by the Dominion it ceased to be public land, and "reverts to the same position as if it had been settled by the Provincial Government in the ordinary course of its administration." But that also was against the appellants' contention, for it implied that until settled by the Dominion it remained public land under the Dominion's control. Their Lordships were of opinion that the lands in question, so long as they remained unsettled, were "public property" within the meaning of section 91 of the British North America Act 1867, and as such were under the exclusive legislative authority of the Parliament of Canada by virtue of the Act of Parliament. Before the transfer they were public lands, the proprietary rights in which were held by the Crown in right of the province. After the transfer they were still public lands, but the proprietary rights were held by the Crown in right of the Dominion, and for a public purpose—namely, the construction of the railway. That being so, no Act of Provincial Legislature could affect the waters upon the lands. Nor, in their Lordships' opinion, did the Water Clauses Act of 1897 purport or intended to affect them; for, by Clause 2 the Act expressly excluded from its operation waters under the exclusive jurisdiction of the Dominion Parliament. Their Lordships would humbly advise His Majesty that the appeal should be dismissed with costs.

Gard, Rook and Co., solicitors for the appellants.
C. Russell and Co., solicitors for the respondents.

COURT OF CRIMINAL APPEAL.

COURT OF CRIMINAL APPEAL.

(DARLING, CHANNELL and PICKFORD, JJ.)

[NOVEMBER 5TH, 1910.

REX v. HAWLEY HARVEY CRIPPEN.*

Criminal Law — Practice — Illness of Juryman — Juryman Leaving Jury-box—Bailiff not Sworn—Rebutting Evidence —Admissibility.

During a trial for murder one of the jurymen was taken ill, and it being necessary for him to leave the Court for some time, he was accompanied by an unsworn bailiff and by doctors, who examined him and asked him questions in reference to his condition. There was no suggestion that during the time the juryman was absent from the Court he was tampered with in any way. After his recovery the trial proceeded.

Held, that the fact that the juryman was allowed to leave the Court without being in charge of a sworn bailiff did not constitute a mistrial.

Where evidence which is relevant to the issue is tendered by the prosecution to rebut the case set up by the defence, it is for the Judge at the trial to determine in his discretion whether such evidence should be allowed to be given or not. Even if the Judge exercises his discretion in a way different from that in which the Court of Criminal Appeal would have exercised it, that affords no ground for quashing the conviction of the prisoner. If, however, it is shewn in any case that the prosecution has done something unfair which has resulted in injustice to the prisoner the Court of Criminal Appeal may interfere.

This was an appeal of "Dr." Hawley Harvey Crippen, on grounds of fact and of law, against his conviction at the Central Criminal Court on October 22 last, before the Lord Chief Justice, for the murder of his wife, Belle Elmore. There was also an appeal from the refusal of Mr. Justice Ridley to allow him to be present during the hearing of the appeal.

*27 T. L. R. 69.

Mr. Tobin, K.C., *Mr. Huntly Jenkins*, and *Mr. H. D. Roome*, appeared for the appellant; and *Mr. R. D. Muir*, *Mr. Travers Humphreys*, and *Mr. S. Ingleby Oddie*, for the Crown.

Mr. Tobin said that the first ground of appeal was that one of the jurymen absented himself from the rest of the jurymen without having been given in charge of a sworn bailiff. A juryman was taken ill on the second day of the trial, and left the jurybox, leaving the others remaining in the box. He was attended by Dr. Willcox, Dr. Marshall, who were witnesses of the Crown, and by Dr. Dyer. This was on affidavit. (Mr. Newton's affidavit was then read.) There was not the breath of a suggestion that any one of those doctors said anything to the juryman concerning the case. But a serious question of principle was involved, in that no bailiff was sworn to take care of the juryman while he was sick, and while he was being attended. He ought to have been given in charge while the other 11 remained under the eye of the Judge. No one at the time thought that what was done was improper,but he submitted he could insist on this now. To what lengths might things go, and who was to know what might happen, if this kind of thing was allowed; it was too serious to be ignored or passed over. In consequence of what was done he submitted that the jury ought to have been re-sworn, or a fresh juryman added, and the case re-started. The old common law was quite clear, that a jury was not allowed to separate in any case of felony. By 60 and 61 Vict., ch. 18, juries were allowed to separate in cases of felony, except in murder, treason, and treason felony.

Mr. Justice Darling:—But in murder cases the jury, when they retire for the night, sleep in separate beds, and on other occasions have to be separated.

Mr. Tobin said that on these occasions the Court had adjourned, and the jury were in charge of two sworn bailiffs. But the Court was not adjourned during this juror's absence.

Mr. Justice Pickford:—Is it necessary that the bailiff should be sworn? Is not the object of the swearing only to give the Court security that the bailiff shall do his duty?

Mr. Tobin said that in a murder case the Court ought to have the highest security.

Mr. Justice Pickford:—That only means that the Court should in fact be satisfied.

Mr. Muir said he had the bailiffs in Court, and also evidence to shew what the practice of the Central Criminal Court was.

Mr. Justice Darling said that as an affidavit had been sworn they ought to ascertain the facts, and that, as evidence was to be called, they thought that the appellant, who was in the building, ought to be present.

Crippen, accompanied by four warders, then entered the dock, and on the direction of Mr. Justice Darling was allowed to be seated.

Mr. Herbert Austin, deputy-clerk of the Central Criminal Court, said that the jury was in charge of the sheriff and that two bailiffs were sworn to keep them in charge as representing him. The practice, when a juryman had to leave the Court for any necessary purpose, was that one of the bailiffs, or the clerk or deputy-clerk of the Court, should accompany him and see that no one had any communication with him. The person so accompanying him was never sworn.

James Phillips, one of the ushers at the Central Criminal Court, said he was sworn to take charge of the jury during adjournments. The jury slept at an hotel in the city at night; they had a corridor to themselves with separate bedrooms, the two bailiffs being with them. When the juryman fell ill at 11.30 o'clock he was taken out of Court to a space outside where there was open air, and to which the public had no access. He (the witness) was with him the whole time. The doctors and a constable were present. They were in the open air for three-quarters of an hour. The juryman rejoined his fellows about 1 o'clock. During the whole time no one spoke to him about the trial. The doctors only spoke to him, and no one else had an opportunity of speaking to him.

Cross-examined by Mr. Tobin, the witness said he had not been sworn again on the day in question. On the way to the open air they had to pass a few people, less than a dozen. The juryman was quite collapsed.

Dr. Sydney Reginald Dyer, medical officer of Brixton Prison, said that he and Dr. Wilcox went to the juryman's assistance. As the Court was stuffy he took him to the open air. After consultation he returned to Court and gave an opinion as to when he would recover, and was sworn to take charge of him, taking the same oath as that administered to the bailiffs. Nothing was said to the juryman about the trial.

Mr. Tobin asked no questions. He submitted that here was a case where there was an opportunity of speaking to a juryman who was accompanied only by an unsworn bailiff. This might have led to serious consequences. Then came the question whether the Court had power to quash the conviction on this ground. There powers were limited by section 4 of the Criminal Appeal Act, 1907, and he submitted that they had power on the ground that the Lord Chief Justice in allowing the trial to proceed after this occurrence had come to a wrong decision on a question of law. Otherwise there was no remedy. The Court of King's Bench would not award *a venire de novo,* because a verdict had been given and sentence passed, and it was only awarded where there was an irregularity in the record.—*Reg.* v. *Murphy,* L. R. 2 P. C. 535.

Mr. Justice Darling said that if they thought the Lord Chief Justice had made the mistake suggested, they were of opinion they could give redress under this section.

Mr. Muir said that the principle was that unless it could be shewn that there had been in fact some tampering with the jury in consequence of their separation, or at least some ground for suspecting it, such separation did not produce a mistrial. In *Reg.* v. *O'Neill and Henderson.* 3 Cr. and Dix (Irish) 146 a trial for larceny, one of the jurymen left the rest under the impression that the case was over, and went into the town. He was searched for and brought back an hour and a half later. O'Neill was convicted, and a motion for arrest of judgment on the above facts was refused. It had to be shewn in such a case that the jury could not be reassembled untampered with in order to constitute a mistrial. The practice of the Central Criminal Courts in this matter was always followed at assizes and quarter sessions, and the bailiff was never sworn.

Mr. Tobin said he remembered a case where Lord Justice (then Mr. Justice) Kennedy was trying a case of murder at assizes. One juror got separated from the rest. Mr. Justice Kennedy travelled up to town and consulted Lord Chief Justice Coleridge, and on his return discharged the jury and restarted the case.

Mr. Justice Darling said it would be better to deal with this point before hearing the other grounds of appeal. The argument came merely to this, that although the bailiff had

been sworn at the beginning of the trial, when this juror was taken ill, it being necessary for him to leave the Court, he was accompanied by an unsworn bailiff, and by doctors who examined him and asked him necessary questions. They thought that the rule that jurors must not separate did not mean, and never had meant, that they must physically be kept together in a narrow space, because, of necessity where trials lasts a long time members of the jury must sometimes be separated from the rest. It appeared that the bailiff had been sworn at the beginning of the trial. Suddenly a juryman was taken ill, and the Lord Chief Justice directed or permitted doctors to go and speak to him, then almost in a state of collapse. The doctors came to the conclusion that it was necessary that he should be removed from the jury-box. The Court thought that all the rules were subject to qualifications in cases of emergency, for a case might arise when it would be necessary to take a juror away before there was time to swear a bailiff. They were of opinion that it was not necessary, on such occasions, that the bailiff should be sworn at all. It was advisable that he should be sworn, as some security that he would not allow the juror to be tampered with, and also because it would impress the juryman himself that he was not to use the occasion of his separation from the rest, to discuss the case separately. They thought that nothing had been decided by the Lord Chief Justice contrary to law, and that what he did was justified by *Reg.* v. *O'Neill and Henderson* (*supra*). Then, was there any violation of the rule that there must not be an opportunity of tampering with a juryman? If they thought there had been such an opportunity, they might have quashed the conviction. So far from there being any evidence of such an opportunity, the evidence shewed that there had been no opportunity whatever, that no one spoke to the juryman but the doctors, and that the bailiff was in charge all the time. And there was not even a suggestion that there had been any tampering with him in fact. The appeal on this point must, therefore, be dismissed.

Mr. Tobin said that the second ground of appeal was that the evidence of James Childers, an employee of Jones Brothers, Limited, Holloway, who was called after the evidence for the prosecution and defence had closed was wrongly admitted. He was called to give what purported to be rebutting evidence. The law as to rebutting evidence was

that evidence which could have been given as part of the case for the prosecution could not be called after the evidence on both sides had closed, if it was for the purpose of strengthening the case for the prosecution, but only to rebut a case set up by the prisoner which the Crown could not have anticipated. He referred to *Reg.* v. *Frost,* 4 St. Trials (N.S.), at col. 386, *Rex* v. *Stimpson,* 2 C. and P. 415, and *Rex* v. *Hilditch,* 5 C. and P. 299. This evidence could have been given as part of the case for the prosecution.

Mr. Justice Darling:—Supposing that you established that this evidence which is admitted could have been given in the first instance, was wrongfully admitted at the time, do you suggest we could quash the conviction?

Mr. Tobin said that he did submit that, as it might lead to a miscarriage of justice. It placed counsel for the prisoner in a terrible position. There was no opportunity to make inquiries, nothing on which to found a cross-examination. The evidence was most damning; great stress was laid on it by the Lord Chief Justice in summing up, and it must have had a great effect on the mind of the jury. The facts were that on July 13, four days after Crippen's flight, and six months after Belle Elmore's disappearance, there was found with some human remains at Crippen's house part of a pyjama jacket bearing on a tab, "Jones Bros., Ltd." On July 14 there were found at his house two complete suits of pyjamas and one odd pair of trousers, the pattern of the latter, but not that of the complete suits, being the same as that of the jacket in the cellar. The cross-examination during the case was directed to shew that the body might have been buried before February 10, 1910. Childers' evidence was to the effect that he was buyer to Jones Brothers, and that the materials of the odd pair of trousers were delivered at Crippen's house on January 5, 1909, and that Jones Brothers became a limited company in 1906. Of course, the Crown could have proved all these facts. But Crippen in cross-examination said nothing on this topic, which entitled the Crown to call evidence in rebuttal. He said he bought two suits in September, 1909, and that the odd pair of trousers formed part of a suit he had bought long before. He (counsel) submitted that on this ground the appeal ought to succeed. *Reg.* v. *White,* 2 Cox C. C. 192, was also referred to.

Mr. Tobin, continuing, said that his last point was that the identity of the remains found buried at Hilldrop crescent was not established. His submission was that it was never established that the remains were those of a woman, and in any case it was never established that they were the remains of Cora Crippen. The evidence for the Crown was that no head, limbs, or bones had been found. There was nothing to indicate sex. But with the remains had been discovered some long hair in Hinde's curlers—hair similar to that of Cora Crippen—some portions of clothing, of combinations with lace, and of a camisole, a handkerchief, and part of a man's pyjama jacket. The clothing was in part that of a woman, in part of a man. In the course of his summing up the Lord Chief Justice had said: "Why should the body be clothed in a woman's vest; why should there be a woman's vest with lace on the arms," But there was no evidence of that, and it was never suggested that the body was clothed.

Mr. Justice Channell asked whether the second sentence was not in the nature of a correction of the first.

Mr. Tobin said that he submitted that was not so. The Lord Chief Justice had also said: "Gentlemen, that they are the remains of a woman now is really not seriously disputed." He had always disputed that the remains were those of a woman, and he was amazed to hear the Lord Chief Justice make this observation. The Crown had produced a piece of skin and flesh in size, 7 in. by 6 in. It was clearly proved that this had come from the lower part of the abdomen of somebody. The doctors for the defence had held another opinion. but they had on further consideration abandoned it. The Crown said that on this piece of skin a mark some 4 in. long was a scar caused by an operation such as it was proved that Mrs. Crippen had undergone. The evidence of Dr. Turnbull and Dr. Wall, the doctors called for the defence and medical men with the highest qualifications, was that the mark had been caused by the folding of the piece of skin. That the pressure upon it in the ground had been severe was apparent from the fact that the lines of some stuff buried with it were imprinted on the skin in one place. Further, the evidence for the defence was that owing to the presence of sebacceous glands the mark was not that of a scar.

Professor Pepper said, that probably this piece of skin covered the place where somebody's navel must have been; but that as there was no trace of it the navel must have been removed. The witness who had said that she saw the scar on Mrs. Crippen had also said she had seen a navel. If that were so this piece of skin could not have come from the body of Cora Crippen.

Mr. Justice Darling said that Professor Pepper's evidence was that it was most probable the navel was within the area of the piece of skin, but possibly was beyond it.

Mr. Tobin said that the evidence of the witness referred to was not only that there was a navel, but that the scar ran up to it. In another passage of the shorthand notes of the summing up of the Lord Chief Justice was reported to have said: "In order to satisfy you that it is not Cora Crippen the defence must have satisfied you that there is no scar there, because then of course if there was a scar there, coupled with the pyjama and the camisole, and the combinations and the vests, you have to ask yourselves have you any doubt that that is the body of Cora Crippen." It was true that the shorthand writer had written a letter to the Court and to himself dealing with the passage, but he submitted that in whatever way the passage was read the Lord Chief Justice had not directed the jury accurately as to the burden of proof.

Mr. Justice Darling said that in more than one passage the law as to the onus of proof had been most clearly laid down.

As to the purchase of hyoscin, Crippen had bought it quite openly, and had signed the book in his own name, when there was no need for him to do so. The evidence for the defence shewed that an animal mydriatic alkaloid had been produced in putrefying meat. If so, why not in human remains? In conclusion the learned counsel said it was unnecessary for him to comment on Crippen's disappearance, his flight, and the lies he told.

Mr. Justice Darling, after consulting with the other members of the Court said, that they would only call upon Mr. Muir on the point as to the admission of evidence in rebuttal.

Mr. Muir said, that the case of "*Wright* v. *Wilcox*" (9 C. B. 650), established that the question of whether or not the admission of evidence in rebuttal should be admitted

lay in the discretion of the Judge presiding at the trial; but that the exercise of that discretion was subject to review by the Court of Appeal. He submitted that the discretion of the Judge in "*Rex* v. *Hilditch*" (5 Carr. and P. 299), was wrongly exercised. With regard to Mr. Childers' evidence, which was given at the close of the case for the defence, the facts were that the first part of it was taken on the night of October 17th, the night before the trial; but his statement was not delivered to the counsel for the Crown until after the trial had begun. The identification by Mr. Childers of the remains of the jacket found in the grave did not take place until after 2 p.m. on October 19th, which was the second day of the trial. The prosecution had then to consider whether they would give Mr. Childers' evidence in chief, first giving notice of it to the defence. If they had done so all they would have proved was that the three suits of pyjamas were not sold to Crippen earlier than November, 1908, some fourteen months before February, 1909. The prosecution had already proved that the remains with which was found the jacket of the pyjamas had been in the ground only eight months at the most, from July, 1910. The prosecution therefore determined not to call Mr. Childers. And had not Crippen made a positive statement that he had bought the pyjama trousers so long ago that the jacket had been worn out and passed out of existence at a time long before these remains could have been buried—had not that statement been made Mr. Childers would not have been called. He was called to rebut that evidence by the permission of the Lord Chief Justice. His submission was that in those circumstances the learned Judge rightly exercised his discretion.

Mr. Tobin in reply said that Crippen had not given this evidence in chief, but only in answer to the direct questions of Mr. Muir in cross-examination, who had Mr. Childers' proof before him. Under those circumstances he submitted that the evidence in rebuttal should not have been admitted.

Mr. Justice Darling in deliverng the judgment of the Court, said that since they had decided the first point, Mr. Tobin had taken further points in favour of his client.

The first was that the Court ought to quash this conviction because the Lord Chief Justice had allowed the prosecution at the close of the case for the defence to call what was called rebutting evidence. The rule was that a Judge

in considering whether he should allow rebutting evidence to be called should consider whether that evidence could have been given, or ought to have been adduced by the prosecution as a part of their case and before they closed it. They did not feel inclined to lay down the rule in the words of Chief Justice Tindal, in the case of "*Reg.* v. *Frost*," vol. 4, State Trials, new series, at column 386 (*ubi sup.*) He had said: "There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso*, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso*, may not be answered by contrary evidence on the part of the Crown." They would not put the rule in those words. In the first place the rebutting evidence must be evidence admissible in the case. Supposing it to be admissible evidence it then became a question for the Judge at the trial to determine in his discretion whether the evidence, not having been tendered in chief, ought to be given as rebutting the case set up by the defence.

In coming to that decision he should have regard to what had been laid down in the cases cited by Mr. Tobin. But the matter was one within the discretion of the Judge who presided at the trial, who was in a much better position than any appeal Court to determine whether it was really fair to allow it to be given, and whether it did or did not expose the defence to a disadvantage to which they ought not to be exposed. It did not appear to have been laid down in any case that if a Judge exercised his discretion in a way different to that which a Court of Appeal would have exercised it, that fact alone was sufficient ground for quashing a conviction. The only case where anything of the kind was suggested was that of *Wright* v. *Wilcox* (1850), 9 C. B. 650, where the Lord Chief Justice had said: "The time at which evidence is to be received must be in the discretion of the Judge, the exercise of that discretion being subject to the review of the Court." There was nothing in the judgments of the other Judges in the case to the same effect—in

the judgments of Mr. Justice Maule, Mr. Justice Creswell, and Mr. Justice Talfourd. There was nothing in those judgments as to whether the Judges' discretion was subject to the review of the Court. Mr. Justice Maule said: "The objection to the reception of the evidence was that it was offered too late. It would be very inconvenient to hold this to be a sufficient ground for setting aside a verdict. Cases in which the discretion of the Judge must be exercised frequently occur. When a party has closed his case he often asks and is allowed to supply a deficiency." No doubt the question was one for the discretion of the Judge at the trial, who was necessarily in a far better position to exercise it than the Court of Criminal Appeal could possibly be.

All they could say was this: "The evidence admitted in rebuttal was admissible evidence, and the Lord Chief Justice has seen no reason why, in fairness to the defence, it should not have been given. He had exercised his discretion and, even if they had the power to do so, they saw no reason why they should interfere with it. But they wished to add a few words to what had been said. If it were shewn that the prosecution had done something unfair —had set what had been called a trap—which resulted in an injustice to the prisoner, the Court reserved to itself full power to deal with the matter. It was only necessary to say that in such a case the Court would probably come to the conclusion that there had been a miscarriage of justice, and exercise the powers given to them by section 4 of the Criminal Appeal Act, 1907. But there was no reason to suppose that anything of that kind had taken place here. On this second ground advanced by Mr. Tobin they saw no reason to interfere with the conviction.

With regard to the next ground, that there was no proper evidence before the jury to establish the fact that the remains found at Hilldrop crescent were those of a woman, and that in any case there was no sufficient evidence to prove they were the remains of Cora Crippen—with regard to this ground Mr. Tobin in the course of his argument went into the evidence given by the doctors on both sides as well as into the evidence as to what was found buried with the remains—the clothing and other articles. They thought that there was evidence before the jury, and a great deal of evidence which would justify the verdict at which

they arrived and to establish the fact that these remains were those of Cora Crippen. With regard to the evidence of the doctors concerning the piece of flesh and skin, they were not surprised that the jury preferred the evidence given by the medical men called for the Crown. For the doctors called for the defence when cross-examined had been obliged to abandon an opinion they had expressed with confidence, and had expressed in writing. They did not wish to say anything more by way of criticism than that. They were not surprised that the jury had preferred the evidence given by the doctors called for the prosecution.

It remained for them to deal with the criticism that was directed to the summing up. Mr. Tobin had said in the course of the argument that every point that had been made on behalf of the prisoner was put to the jury, and put fully and fairly. But he had criticized a phrase used here and a phrase used there in the course of a long summing up. Sitting in that Court they had often said in similar cases that they would not interfere where attention had been called to phrases ambiguously used or not expressed quite so fully and clearly, or not expressed with the exactitude which, as counsel would point out, might have been used. They must look and see whether, taking the summing up as a whole, the Judge had put the issue fairly to the jury: whether all the evidence was before them, and whether the Judge adequately directed the attention of the jury to where lay the burden of proof. They thought it was plain that in this case the Lord Chief Justice had not left the jury with any false impression as to the burden of proof. Mr. Tobin had argued that that was not so, but he would read one passage from the summing up to shew how clearly the matter had been put to the jury. The Lord Chief Justice had said: "Now, gentlemen, I have left that part of the case as I have told you. I have dealt with it first because, if you believe the story of the defence, it is a conclusive answer to this charge, and you need not trouble about the other points . . . and if upon considering the whole of this case you come to the conclusion that you were not satisfied with Crippen's account, then you have to consider with me whether the Crown have established their case upon the two issues of Cora Crippen's remains being those found in the house, and of that woman having been poisoned by the act of the defendant. Of course, if that is true it is a further contradic-

tion of the story he has told you." In those words the law was clearly laid down. The burden of proof lay upon the Crown. If when the prisoner had given his account the jury believed it the case for the Crown necessarily came to an end. But if they did not believe it, even then the jury were entitled to acquit him because it still remained with the Crown to prove that the prisoner killed his wife and that the remains found at Hilldrop crescent were those of Cora Crippen. They thought that, notwithstanding the criticism that had been levelled at the summing up, it did put adequately, fully and fairly the complete case for the prisoner, and that no injustice had been done by any term, phrase or sentence used in the summing up.

They considered that there was ample evidence to support the verdict of the jury, and that, on all the points taken, the appeal failed.

Arthur Newton, solicitor for appellant.

The Director of Public Prosecutions, for the Crown.

IN THE COUNTY COURT OF THE COUNTY OF YORK.

DENTON, J.] [NOVEMBER 23RD, 1910.

MAY v. CONN.

Some days prior to the 2nd of September, 1910, the plaintiff took two horses to the Repository of Burns & Sheppard, Toronto, for sale by public auction or private contract. Burns & Sheppard, when the horses arrived, made an entry in their sales book giving the name of the owner. the age of each horse, assigning a number to each horse, the colour, the price required and the warrant accompanying each horse. The warranty opposite the name of the horse in question in this action was "serviceably sound." The horses were put up for sale on Friday, 2nd September, but the figure asked was not reached. Shortly afterwards the plaintiff met the defendant in the lane outside the office of Burns & Sheppard, and negotiations were commenced for the sale of the two horses in question. The horses were brought out and trotted up and down the lane and examined by the defendant, and after some time the bargain was come to whereby plaintiff sold to the defendant the two horses in question for $375. There was some conflicting evidence as to whether a warranty accompanied the sale. The plaintiff says he gave no warranty. The defendant and his witness Hurdman say he did. I do not give full credence to the whole of the defendant's evidence as to what was said at the time about one of the horses being sick. I am satisfied that the horse was not sick at the time, and that nothing was said about the horse being sick. It was trotted up and down the lane and the defendant, who is an experienced horse dealer, purchased after inspection. But I do find on the evidence that what was said by the plaintiff was equivalent in substance to a warranty similar to that entered up against the horse when he was brought into the stable; that is to say, that he was "serviceably sound." After the bargain was come to the defendant, who lives in Ottawa, told the plaintiff that he did not want the horses shipped until Monday. This meant that the horses were to remain in

the stable until that time. Burns & Sheppard have a practice of charging board for each horse to the vendor up to and including the day of sale, and to the purchaser thereafter. The plaintiff then led the horses into the stable. Both plaintiff and defendant went into the office of Burns & Sheppard, and the plaintiff told the bookkeeper, Lake—the defendant standing by and hearing and consenting to it all—of the bargain they had come to, whereupon the bookkeeper made an entry opposite the entries as to the two horses in the sale book; this entry by the bookkeeper stating that these two horses had been sold to H. Conn, Ottawa, for $375. I make the finding, notwithstanding the defendant's denial, that he accompanied the plaintiff to the office, and notwithstanding the evidence of the bookkeeper that he is not sure whether the defendant was present or not. At this time the defendant made an entry in his own private memo. book, the entry being under date September 2nd, 1910, "one brown horse No. 8; one bay horse, No. 10, $375." The plaintiff and the defendant then parted. On the night of September 2nd or morning of September 3rd, one of these two horses threw himself in his stall and was found dead by the stablekeeper in the morning. The evidence satisfies me that the horse died from accidental causes. It has not been shewn that any illness the horse may have had or any defect which would render the horse not "serviceably sound" had anything to do with the death. The defendant met the plaintiff on Monday, September 5th, and while willing to take the other horse at $210, of course rejected the one that had been killed, and refused to pay for same. Burns & Sheppard, for the plaintiff, but apparently without the plaintiff's knowledge or consent, let defendant have the other horse for $210. This action is brought to recover $165, being the difference between $375 and $210.

Two questions are presented for decision: first, the Statute of Frauds is pleaded. I am of opinion that when the bookkeeper made the entry in the sales book of Burns & Sheppard he did so as agent for both the plaintiff and defendant. That entry appears opposite the full particulars of these two horses, and the two entries together contain a memorandum in writing sufficient to satisfy the Statute of Frauds. The names of both plaintiff and defendant appear together with the description of each horse and the price at which they were sold. It is true that the defendant's

signature is not at the end of the entry, but that does not appear to be necessary. If the signature appears in the body of it it is sufficient. *Evans* v. *Hoare,* 1892, 1 Q. B. 593. I am furthermore of the opinion that the leading of the horses after the sale into the stable where they were to remain at defendant's request until shipment on the following Monday was a delivery to the defendant. In other words, there was a receipt under the Statute of Frauds, and I am of the opinion that the delivery of these two horses to the defendant followed as it was by the defendant going into the office and taking part in causing the entry to be made in the sales book and in making his own entry in his private memo. book amounts to an acceptance, not in fulfilment of the contract, but in recognition that a contract existed. That is all that is necessary to be shewn under the Statute of Frauds.

The other and more interesting point to be decided is whether plaintiff or defendant should bear the loss. All parties at the trial conceded that the rules of Burns & Sheppard's Repository, which were filed as exhibit 1 are applicable to the sale of these two horses. Both plaintiff and defendant's counsel were anxious to make use of these rules. The first rule provides that all horses sold with a guarantee must be returned by 12 o'clock noon, on the day following the sale if not as warranted, otherwise the proprietors will not be responsible in any way, and the purchaser has no recourse. Then rule 5 provides that the lot is at the seller's risk, and expense until the fall of the hammer, and at the buyer's after that time. At common law the moment the sale and delivery of these two horses took place the ownership in them was transferred from the plaintiff to the defendant and the only remedy open to the defendant would be to sue for breach of warranty. These rules, however, attempt to change the common law rule and provide that where a guarantee is given the purchaser has until 12 o'clock of the day following the sale to return the horse if not as warranted, and if he does not do this no action lies for breach of warranty. But it is not clear that the rules accomplish their purpose, and that the purchaser may not have an action for breach of warranty even although he has not made the return within the time stated. *Vide Chapman* v. *Withers,* 20 Q. B. D. 824; *Gunby* v. *Hamilton,* 12 O. W.

R. 489. On the other hand see *Hinchcliffe* v. *Barwick*, 5 Ex. D. 177.

The question to be determined in this case is—who must bear the loss where a horse is sold subject to a warranty and with a right of return within a limited time if not according to the warranty, and the horse dies while in the possession of the purchaser,, and before the time limited for return without any negligence on the purchaser's part, there being no evidence that the horse did not comply with the warranty, but on the contrary there being evidence that he did so comply. Counsel for the defence cite two authorities in favour of the view that the loss in such a case must be on the vendor. The first is *Head* v. *Tattersall*, L. R. 7 Ex. 7. In that case it was admitted by all parties that the horse did not answer the warranty. There was therefore at the time of the loss a continuing right in the purchaser to rescind the contract of sale by returning the horse. In this case I cannot find that the horse did not comply with the warranty. On the contrary if it is necessary to a decision of this case that a finding should be made as to whether the horse answered the warranty or not, I find upon the evidence that it did. But while *Head* v. *Tattersall*, can I think be distinguished, the dicta of Cleasby, B., at page 13 is applicable to this case. The learned Judge says:

"The case of the death of the animal purchased is different and need not be considered now. Moreover, the matter may be put thus: as a general rule damage from the depreciation of a chattel ought to fall on the person who is the owner of it. Now here the effect of the contract was to vest the property in the buyer subject to a right of rescision in a particular event when it would revest in the seller. I think in such case that the person who is eventually entitled to the property in the chattel ought to bear any loss arising from any depreciation in its value caused by an accident for which nobody is in fault. Here the defendant is the person in whom the property is revested and he must therefore bear the loss."

Applying this language to the facts of the present case is it not the purchaser who should bear the loss? The horse in question was vested in the purchaser when the sale was made and delivery took place. The purchaser had the right to rescind the agreement by returning the horse within the proper time for breach of warranty. He could not rescind

the agreement unless he could shew that the horse did not comply with the warranty. The evidence in this case goes to shew that the horse did comply with the warranty and the purchaser therefore would not have had the right to return it even if the horse had lived until 12 o'clock the next day. The other case relied on is *Gunby* v. *Hamilton*, 12 O. W. R. 489. The facts of that case are widely different but it is clear that the stallion in question did not comply with the warranty. There was therefore as in *Head* v. *Tattersall*, a continuing right to return it, and this right existed at he date of the animal's death. It would seem probable that Mr. Justice Garrow had this distinction in mind when he made use of these words in *Gunby* v. *Hamilton*, 12 O. W. R. at p. 492. "The principle running through all those cases being that so long as the right to return continues, the risk, apart from negligence on the part of the vendee or other special circumstances lies with the vendor." The decision hinges on whether the right to return continues. The right to return depends on whether the horse answered the warranty. In this case I find upon the evidence that it did answer the warranty, and if it did there was no right to return. In that view of the case the defendant fails. It is true that the defendant may complain that he is taken at a disadvantage in that he has not had full opportunity of inspection. In other words, he may say that if he had been given till 12 o'clock the next day he might by inspection have discovered such defects as would have enabled him to return the horse. Even so, some one must bear the loss and the hardship is no greater on him than it would be upon the plaintiff who, if called upon to bear the loss, could truly say that he sold the horse in good faith and delivered it to purchaser, that it complied with the warranty, that the horse was the property of the purchaser when it died, and that he should bear the loss. With much hesitation and doubt I have come to the conclusion that there must be judgment for the plaintiff for $165 and costs. There will be the usual stay for thirty days.

J. D. Falconbridge, for the plaintiff.

G. M. Clark, for the defendant.

CANADIAN NEWS.

The Law Association of the county of Hastings entertained Sir Glenholme Falconbridge, Chief Justice of the King's Bench, at a banquet, held in the Hotel Quinte, Belleville, on 6th December. A goodly number of the representative lawyers of the county gathered at this quarterly function, which the Bench and Bar of Belleville initiated some four years ago,

The president, Colonel W. N. Ponton, K.C., read letters of regret from Mr. Justice Davidson, of the Montreal Bench, Col. S. S. Lazier, Judge Deroche and J. Parker Thomas, K.C. A very interesting letter was read from Honourable A. B. Aylesworth, Minister of Justice, and a generous tribute was paid to him by Mr. E. Guss Porter, K.C., M.P., in his excellent speech proposing the health of the new K.C.'s, Messrs. Morden and Wills, who were duly called within the Bar with all the honours. The toast of the Chief Justice was proposed by Mr. F. E. O'Flynn, who had in old days been a student in his office, and was felicitously responded to by Sir Glenholme Falconbridge, with that charm of literary diction, mellow anecdote, ripe experience and human sympathy for which he is noted and loved. The Chief Justice has now been 24 years on the Bench, his only senior being Chancellor Sir J. A. Boyd.

Mr. J. J. B. Flint, the veteran member, proposed the health of W. N. Tilley, K.C., of Toronto who had been one of the counsel engaged in the great drama recently enacted at The Hague tribunal of arbitration between the United States and Great Britain. He gave a very vivid word picture of the transactions and of the personnel of the parties engaged on both sides. His address was a unique feature of a most enjoyable and profitable evening. Mr. T. A. O'Rourke, of Trenton, happily proposed the junior member of the Bar, Mr. Shorey, who modestly responded. The health of the one and only law student, Mr. Nathan Jones, was proposed by Mr. M. Wright, and responded to by Mr. Jones to the best of his ability in the absence of his comrades in Toronto. Very happy speeches and contributions to the enjoyment of the evening in song and story were also made by Messrs. Diamond, Carnew, Mikel, Forin, Nield, Williams and Sheriff

Morrison. Absent friends were not forgotten, and the four hours spent together will long live in the memory of all present as unique among the many scenes of intellectual convivality which the dining room of the Hotel Quinte has witnessed "in the gladsome light of jurisprudence."

The Law Association of the county of Hastings is one of the most energetic in Ontario. At the assizes and non-jury sittings of the High Court it entertains the Judges and outside members of the Bar at informal banquets, when delightful social evenings are spent. The other county law associations will do excellent work in adopting what has been so splendidly carried out at Belleville. Re-unions of the members of local Bars are worthy of every encouragement. If a few enterprising members will take hold of the work in each of the county towns similar gatherings can easily be carried through to a successful conclusion, thereby promoting and encouraging that cordiality and good comradeship which should ever exist between Bench and Bar, and among lawyers.

A. E. Honeywell, Barrister, Ottawa, and W. N. Graham, formerly of the Canadian Northern legal department, have formed a law partnership at Ottawa under the firm name of Honeywell & Graham.

J. R. Colwill has become associated with F. G. Taylor at Portage la Prairie, the new firm being known as Taylor & Colwill.

Gilbert Colquhoun has commenced practice at Rapid City.

A deputation of eleven members of the Junior Bar of Montreal on the 2nd December interviewed. Sir Wilfrid Laurier asking for the appointment of three additional Judges for the Montreal Circuit, urging the great congestion of cases in that Court and subsequent delays. The Premier gave an encouraging reply.

On the 28th November the following Barristers and Attorneys were sworn in and signed the rolls before the Manitoba Court of Appeal:

Barristers—G. H. Aikins, J. R. Colwill, C. Y. Mackenzie, J. F. McCallum, W. S. Boyd, J. M. George, A. Bernier, L. F. Earl, C. H. Allen.

Attorneys—G. H. Aikins, W. R. Forrester, J. F. McCallum, L. F. Earl, G. A. Colquhoun, J. R. Colwill, C. Y. Mackenzie, A. Bernier, W. S. Boyd, J. M. George.

The Benchers of the Law Society of Saskatchewan for the ensuing three years are as follows: Norman Mackenzie, K.C., Regina; James McKay, K.C., Prince Albert; J. A. M. Patrick, Yorkton; W. B. Willoughby, Moose Jaw; James Balfour, Regina; E. L. Elwood, Moosomin; O. S. Black, Weyburn; C. E. D. Wood, Regina; H. Acheson, Saskatoon.

Frank Ford, K.C., who for some years has been Deputy-Attorney-General of Saskatchewan has become a member of the law firm of Emery, Newell & Bolton, of Edmonton.

Chas. Gaudet has been appointed a King's Counsel for the Province of Quebec.

A. K. Goodman, late manager of the Trusts and Estates Department of the Union Trusts Co., Ltd., and D. G. M. Galbraith of the law firm of Vickers & Galbraith, Toronto, have formed a law partnership at Toronto under the firm name of Goodman & Galbraith.

Gordon S. Hanington, Barrister, Glace Bay, N.S., was married on the 29th October to Miss Catherine McDonald of the same place.

Chas. M. Peck, K.C., of Hopewell Hill, died on the 29th October.

J. M. Stevenson of the law firm of Wylie, Mundell & Stevenson, of Moosomin, has severed his connection with that firm, and has commenced practice at Saskatoon.

R. F. Feeze, E. C. Wayman, A. E. Pearson, A. N. Vince, U. King, D. K. Hazen, H. W. Lunney, G. E. Logan, J. S. Tait, and G. R. Long were called to the New Brunswick Bar on the 10th November.

The triennial election of the Benchers of the Alberta Law Society was held on the 7th inst. The following were elected: James Muir, K.C., Calgary; W. L. Walsh, K.C., Calgary; C. F. P. Conybeare, K.C., Lethbridge; J. C. F. Brown, K.C., Edmonton; O. M. Biggar, Edmonton; D. G. White, Medicine Hat; George W. Greene, Red Deer; R. B. Bennett, K.C., Calgary; E. P. McNeill, Macleod.

A. E. Bence, Lanigan, and J. M. Stevenson of Moosomin, have formed a partnership at Saskatoon under the firm name of Bence & Stevenson.

John L. Crawford, Barrister, Red Deer, Alberta, has been appointed Judge of the District Court of Macleod, in the room and stead of His Honour A. A. Carpenter transferred to the District of Calgary.

W. R. Gunn, Barrister, Melfort, Sask., died on the 18th November. He had an extensive knowledge of ordinary north-west law, and was noted for his marvellous memory. It is said he knew the Bible by heart, and if a quotation were given to him he could tell the chapter and verse. At one time he could read a book through and repeat it word for word.

The following King's Counsel have been appointed in the province of Quebec:—

District of Montreal—Messrs. J. B. Bissonnette, Fortunate Bourbonniere, Victor Martineau, A. R. McMaster, L. J. S. Morin, Montreal.

District of Montmagny—Mr. Maurice Rosseau, Montmagny.

District of St. Hyacinthe—Mr. Emile Marin, St. Hyacinthe.

C. F. Campbell, Barrister, has commenced practice at Vancouver, B.C.

THE VALUATION OF PUBLIC UTILITIES FOR PURPOSES OF COMPENSATION.

The title given to what I have to say is much more ambitious than it deserves. All I intend to attempt is to give some brief notes of a matter with which I was recently professionally connected, and to call attention to some aspects of the case in so far as they are of general interest to our municipalities.

The case with which I was concerned was the application of the town of Wolfville for statutory authority to establish its own electric light and power plant. In this town, as in most other of our municipalities, the business of furnishing electric current had been acquired by a private enterprise. In most cases this is a company with something in the nature of charter rights. Wolfville's case is peculiar in that the persons furnishing the current are merely a private unincorporated partnership without any statutory rights whatever, and no special authority to carry on their business except some vague power granted by the municipality of King's County many years ago before the incorporation of the town. Apparently, as I hope to shew, this should make a difference in the attitude of the Legislature, but it did not, and the firm was treated throughout the legislative struggle in precisely the same way as though it had been operating under a regular charter. The service was not satisfactory to the people of the town, and in 1907 the necessary resolutions for the establishment of a municipal plant were passed and an Act for that purpose applied for.

Such applications have not been uncommon and the Legislature has adopted a policy in dealing with them. This is as it should be. A settled principle is manifestly required, and the criticism I have to offer is not so much of the principle adopted as that it has been left so indefinite in its application as to really amount to no policy at all. The principle adopted is apparently that no municipality in which a private electric light plant is in operation shall be permitted to establish a municipal plant without first

acquiring the private plant. I say "apparently" because not only is the language of the different Acts most vague and confusing, but it is very seldom the same in any two Acts, being left pretty well to the promoters of the different Acts to draft in general accordance with their understanding of an assumed principle which neither they nor the legislature clearly apprehend themselves. With the principle stated in the foregoing general terms perhaps not much fault is to be found. At the same time it should be noted that the Legislature is shewing peculiar tenderness to the people engaged in this particular class of business. The case of the old stage coach proprietors whose business was taken away by the establishment of railroads was of almost equal hardship, yet nobody suggested a cent of compensation to them. Even if it is to be applied in the case of a company operating under a charter and which can therefore fairly set up the plea of statutory rights calling for compensation, it is difficult to see its application to an unincorporated firm. In the case of a company, the town at least had full notice that it was prepared to establish such an industry in its midst, and could have opposed it or made terms, and in such case it may fairly be urged that the company is entitled to compensation when the town has changed its mind and determined to embark in the business for itself. But no such considerations apply in the case of an unincorporated concern. It consulted nobody, but started as any other trader starts, and it is difficult to see on what principle it can claim immunity from the risks ordinarily incident to its line of business, one of which in the case of electric light is manifestly that of the municipal body embarking in the business for itself.

The legislature, however, ignored any such distinction and dealt with the partnership in the customary way. This is by providing that the municipality shall acquire the property of the company by agreement if possible—if not, at a price to be determined by arbitration. Superficially this seems fair enough, but the mischievous vagueness of the clause becomes evident as soon as proceedings are taken under it. Of this the *Wolfville* case is an excellent illustration. The actual value of the tangible property of the firm, that is, its power-house, machinery, poles, wires, etc., was, at the time of the arbitration, according to the valuation of the experts called in by themselves, not above $10,000, and

was probably considerably less, and yet two of the arbitrators concurred in an award fixing the amount to be paid as compensation at $25,000. The excess was arrived at, as one of the arbitrators informed me, by capitalizing a sum sufficient to produce at five per cent. interest, an amount equal to the average profits of the concern in the previous two or three years, and allowing this as compensation for the loss of the goodwill of the business. Naturally the town refused to take up the award and determined to proceed with the establishment of its own plant irrespective of the company, and if need be to test its right to do so in the Courts. To do so, however, it was found necessary to increase the amount which the town was authorised to borrow and a simple act of one section was introduced for that purpose. This was of course opposed by the company. It was at first sought to compel the town to take up the award as the condition of obtaining the additional legislation. The Committees of the Assembly by which this bill was dealt with declined to accede to this suggestion, but instead inserted in the bill a clause providing for a further arbitration which it was proposed to make both compulsory and conclusive. With its recent experience of the possibilities of arbitration the town refused to accept any further arbitration, unless defined and limited in some such way as is done by the English Acts, to which I shall refer in a moment, either by eliminating goodwill altogether or by fixing the amount of compensation under that head at a definite sum or at an amount determined, by a proportion to the value of the tangible property. This the Committee refused to do, and rather than submit to the possibility of a repetition of what it considered a gross injustice, the town withdrew its bill leaving the firm masters of the field for the time being.

It is evident from this brief summary that the weak spot in the policy adopted by the legislature is the extreme vagueness of the arbitration clause, and this vagueness is most apparent in relation to the claim always made for compensation for the loss of the company's business. As to the value of the actual tangible property, the possibilities of dispute are not very serious, and any honest and competent experts will probably approximate very closely in their figures. But when the arbitrators leave this realm of actualities and embark on that of speculation, results the most diverse are possible.

Most of the clauses require the property of the company to be paid for as "a going concern"—a phrase which seems to call for recognition of the good will in some way. It is not clear why it shall be recognised in these cases. They are different from an expropriation of any ordinary trading concern which has built up a business by its own energy and industry and in open competition. The good will of an electric light concern or other public utility is much more due to the growth of the community in which it carries on business than to any efforts of the owners. It is generally a monopoly, and given a fairly good initial installation and a reasonable service it cannot help growing with the growth of the community. To compel the community to pay for this is to compel it to pay for what it has, in large part, itself created.

But assuming that it has to be paid for, on what principle is it to be assessed? The variations of principle possible are infinite. For instance, in the *Wolfville* case it is asserted that the company in anticipation of expropriation had allowed their property to run down and divided practically all their earnings as profits. If proper expenditure for upkeep had been made, or a proper allowance made for depreciation, the profits which were taken as the basis of the allowance for good will would have shewn very much smaller. Again, in the same case the owners of the concern were also the practical managers and consequently no deduction, it is claimed, was made for the value of their own services, which should of course have been done in any fair calculation of net average profits. Any business man can easily see for himself other ways in which the basis on which the value of the goodwill is calculated might vary enormously. If the valuations were in all cases made by the same men, or by men trained to such work, uniformity at least might be expected, but when they are made by men unfamiliar with the work, it becomes a regular game of chance, in which neither the company nor the municipality can make any forecast of what to expect.

What is obviously required is some properly worked out scheme for the conduct of the arbitrations on a correct and uniform principle. In England this has been provided for many years past. The established English practice, it should be noted, in contrast to our own system or want of system, is to have the establishment of all public utilities regulated, so

far as concerns all the important matters, by acts of general application, leaving only the smaller details of purely local concern to be settled by the private act or order of the local government board. Previous to 1870 it had been customary to insert in acts or orders for the establishment of tramways a provision that the municipality could at any time take over the line on payment of its structural value plus thirty per cent. of the same as compensation for good will. This, President Lowell in his great work "The Government of England" says was deemed to be too severe on the municipalities, although I may say it is far less onerous than the terms imposed by the arbitrators on our municipalities in the different cases in which they have taken over public utility properties. In the *Wolfville* case, for instance, the goodwill allowance was about two hundred per cent. of the structural valuation in place of thirty. Most of our municipalities would gladly accept the terms which were considered too onerous in England. A change was made in England in 1870. By the Tramways Act of that year, sec. 43, ch. 78, it was provided that after twenty-one years the municipality in which the tramway had been established might take over the road "on terms of paying the then value (exclusive of any allowances for past or future profits of the undertaking or any compensation for any compulsory sale or other consideration whatever) of the tramway and of all lands and buildings, works, material and plant of the promoters suitable to and used by them for the purposes of the undertaking within the municipality." This Act, it will be seen, entirely eliminated "good will" as a matter for compensation and substituted for it the right to continue the business for twenty-one years in which time the promoters were assumed to have made sufficient profits to have reimbursed themselves for their enterprise.

The English criticism on this Act is that it has too greatly discouraged the investment of capital in tramway undertaking and that the public convenience has suffered thereby. On the other hand, it is of course urged that the policy is in favour of municipal ownership. That, however, is a different question. The same principle has been applied in the case of electric lighting. So much complaint had been made of the shortness and injustice of the twenty-one years terms that in 1888 when the Electric Lighting Act was passed an extension of it to thirty years was made. At the

end of that period the municipality was empowered to call for a transfer of the undertaking.

"And thereupon such undertakers shall sell to them their undertaking, or so much of the same as is within such jurisdiction, upon terms of paying the then value of all lands, buildings, works, materials, and plant of such undertakers suitable to and used by them for the purposes of their undertaking within such jurisdiction, such value to be in case of difference determined by arbitration; provided that the value of such lands, buildings, works, materials and plant shall be deemed to be their fair market value at the time of the purchase, due regard being had to the nature and the condition of such buildings, works, materials and plant, and to the state of repair thereof, and to the circumstance they are in such a condition as to be ready for immediate working, and to the suitability of the same to the purposes of the undertaking, and, where a part only of the undertaking is purchased, to any loss occasioned by severance; but without any addition in respect of compulsory purchase, or of good will, or of any profits which may or might have been or be made from the undertaking, or of any similar considerations."

This is certainly definite enough and with such an Act to guide them it would be difficult for any arbitrators to stray very far and if they did the Courts would be in a position to control them.

My principal purpose in this brief memorandum is to call the attention of our municipal authorities to this defect in our legislation, and to suggest that they impress on the government the propriety of passing some enactment on the line of the English Acts. If this were done and the conduct of the arbitration either had by the Public Utilities Commission itself or under the general control and supervision of that body, much friction and injustice might be obviated.

Halifax. F. H. BELL.

THE INTEREST ACT.

Discussion in House of Commons on Proposed Amendments thereto.

Mr. Miller moved second reading of Bill (No. 6) to amend the Interest Act.

He said: "This Bill is almost exactly similar to the Bill I introduced last year and which passed its second reading and the committee stage, and stood for third reading, but was not reached. It permits the mortgagor to pay off an overdue mortgage by giving one month's notice of his intention to do so, or by paying one month's extra interest by way of bonus. It applies only to an overdue mortgage; it is not retroactive, but only refers to mortgages made or renewed after this date. The Bill met with the favour of the House last session. It seems to me that a man should have the same right to pay off an overdue mortgage that he has to pay off an overdue note. Last session Mr. Osler, one of the members for Toronto, who has a good deal to do with financial and money lending companies, stated that he could see no wrong in the Bill, and other leading financial men in Toronto have spoken to me in a similar manner. Last session the Minister of Public Works thought that perhaps the Bill might imply that no mortgagor, no matter what was or was not in his contract, could pay off an overdue mortgage unless by giving notice or paying the bonus referred to in this Act. Subsection 2 of the Bill removes that difficulty. Mr. Osler, among others, thought that the mortgagor ought not to be able to give notice repeatedly and, failing to carry out his express intention cause annoyance to the mortgagee. Subsection 3 provides that if the mortgagor gives notice and does not avail himself of it, that he should have no further privilege in that regard.

Mr. Schaffner. I would like to see that Bill go further than it does, and I would like to know what the hon. member (Mr. Miller) means exactly by paying off an overdue mortgage.

Mr. Miller. Mortgages are usually made for a term of five years and when the mortgagor has had the money for five years the term of the mortgage expires, and no matter what provision may be in his mortgage that may bind him to give three months' notice or pay three months' interest before he has the privilege of paying off the mortgage, the mortgage having expired he will have the right to pay off this mortgage by giving one month's notice of his intention, or paying one month's interest in lieu of notice.

Mr. Schaffner. As a matter of fact, almost all mortgages are drawn so that they may be paid off when they become due.

Mr. Miller. Oh, no!

Mr. Schaffner. I think most of the mortgages in our country are drawn in that way. What I would like to see is permission under certain conditions to pay a mortgage before it becomes due. By way of illustration, I will state what occurred in my own case last year. I bought some land on which a mortgage had been put the year before by the previous owner at a very high rate of interest, 8 per cent. When I bought the land I did not wish to pay 8 per cent. interest. I wanted to pay off the mortgage, so that I might, if I wished, put on another at a lower rate of interest; but I was unable to do so. The consequence is that I have to continue paying 8 per cent. on that mortgage for 5 years.

Mr. Carvell. I would advise my hon. friend not to buy the land under those circumstances.

Mr. Schaffner. The hon. gentleman does not quite understand the situation. The mortgage was not equal to the value of the land, and I may have made a very profitable investment even with that mortgage on it. If such a provision as I suggest is not put into this Bill, I intend to bring a Bill into the House to admit of mortgages under certain conditions being paid off before they become due.

Mr. Miller. Loan companies, life insurance companies and other companies lending money on land mortgages have done and are doing a great deal to assist in opening up the western country, and it would be grossly unfair to them to enact the provision which the hon. member suggests, for this reason. Suppose the prevailing rate of interest in the west to-day is 7 per cent. and a man borrows money at that rate on a five years' mortgage. That is the best bargain he can

make at the time. If money goes up to 8 per cent., the lender cannot, under any provision of the mortgage, demand from the borrower an additional one per cent; but if the prevailing rate of interest fell to 6 per cent. during the currency of the mortgage, the consequence of such a law as my hon. friend suggests would be that every borrower would pay off his mortgage, and the mortgagees would have their vaults full of money, with no opportunity to lend it. The privilege would be altogether onesided.

Mr. Carvell. My hon. friend from Souris (Mr. Schaffner) has not evidently taken sufficient time to consider the proposition he has made, because a contract is purely a provincial matter entirely under the jurisdiction of provincial laws. If A agrees to pay B 8 per cent. interest for four or five years, that is a contract, over which this parliament has no jurisdiction whatever. My hon. friend from South Grey (Mr. Miller) is attempting to obtain his object by providing that after a certain notice is given, no further interest shall be chargeable. We cannot compel the mortgagee to take his money, but we can say that after a certain time he cannot charge more interest, because under the British North America Act this parliament has jurisdiction over interest.

Mr. McKenzie. Is not that merely over the rate of interest? Have we any right to make any stipulation as to the contract surrounding it?

Mr. Carvell. My hon. friend has asked me a question which it might be somewhat difficult to answer. I think, however, that if we have jurisdiction to legislate regarding interest, we have jurisdiction to legislate on anything respecting interest. However, that is a matter which perhaps does not arise just now. I can only say to my hon. friend from Manitoba that if he only wishes to attain the object he has in view, the legislature of the province of Manitoba has absolute jurisdiction to pass such legislation, and that is the source to which he should apply for it.

Mr. Aylesworth. I do not intend to offer any violent opposition to the passing of this Bill, but I will say at once that I do not like it. I think it is interfering with the freedom of contract which might much better be left alone. I certainly believe in free trade, and equally I believe in the unhampered right of any person of full age and of sound sense to make his own bargains, and I think that any effort which a legislature makes to protect a man against himself

is simply going to recoil upon the head of the very individual whom the legislature is trying to save. Now, what is going to be the effect of this legislation? Surely it is perfectly plain that if this Bill becomes law, every mortgagee will see that his money is paid when it is due or that he has a new agreement that will postpone the due day. A money-lender with his eyes open, who knows what the law is, is going to see to it that he does not subject himself to what is practically a penalty, namely, the loss of his interest, if this Bill is to operate upon his particular transaction, and if you drive the money-lender to do that, you damage the very borrower to protect whom is the principal object of this Bill.

Mr. Miller. How would you damage the mortgagor in that case?

Mr. Aylesworth. You damage the mortgagor by making the mortgagee harder upon him. The lender, if he knows that his interest is to continue running after the date for payment, will probably be perfectly content to leave things as they are, and not press the borrower who has been unable to pay on the due date. But if the Bill should become law, the lender will know that, on notice being given him, he is liable to be paid off summarily or to lose the subsequent interest, and he will take care that he does not allow the date of payment to pass without exacting it or getting a new agreement postponing payment another twelve months or two years. So that you are going to force the lender to be less lenient than he would be if you had not passed the legislation. I quite admit that the same remark applies to legislation we have already and to which the Bill proposes an amendment. I am not questioning our power to pass it. It was thought by the wise men of some 20 or 25 years ago, who passed the former Act, that we had power to legislate in that way notwithstanding that legislation interfered with the right of contract, and I am not going to discuss that question; but granted that we have the power, I am strongly of the opinion that there is no necessity to exercise it, and that it would be injudicious to do so in the interests of the borrower himself. Surely in this day and generation every one knows that the average borrower is on perfect equality with the average lender. The two are free alike to make their own contract, and there is just as much competition in the lending as in the borrowing. There is therefore no difficulty in the borrower getting a perfectly straightforward and

plain contract to prove his relation with the lender. Under those circumstances, to seek to reimpose a different contract upon him or to put the lender in any position which will force him to take some means whereby he can secure himself at the expense of the borrower, would not, I think, be in the interests of the borrower himself.

Mr. Borden (Halifax). I would like to ask the mover of the Bill whether or not he has made any inquiry as to the laws prevailing in the different provinces with respect to mortgage contracts? This is legislation not designed for one province, but which will affect nine provinces, and I am not sure that it would be perfectly acceptable in all the provinces, having regard to the laws and customs of each.

Mr. Miller. I have consulted legal gentlemen from all the provinces except the province of Quebec, and they all welcome the Bill and say there is necessity for it, and that it would not in any way conflict with the laws in any of the provinces.

Mr. Borden (Halifax). I would think that this is a Bill which at least should be submitted to the attorneys-general of the different provinces before we pass it, in order that we might know exactly what the views of the law officers in each province may be regarding its effect and operation. My recollection of law practice in Nova Scotia would not lead me to believe that this measure would result in any improvement of the conditions in that province, but I speak as one who has not been actively connected with such matters during recent years.

Mr. Schaffner. Our experience in the west is that the mortgagor looks after his part of the business.

Mr. Sharpe (Lisgar). I do not see that this Bill is going to be of much use in western Canada, because there the loan companies renew the mortgages the moment they become due. But the great difficulty we have in southern Manitoba, particularly this year, is, that the loan companies, after lending money for five years at six or seven per cent., and after the loans have run some two or three years, take the opportunity, when the borrowers, on account of poor crops, cannot meet the interest, to make them sign new agreements at a higher rate of interest. I do not think that is fair, and something should be done to stop it.

Mr. Miller. My hon. friend the Minister of Justice thinks that the lender will look out for himself and will im-

pose heavier burdens on the borrower should this Bill pass. I do not think so. I do agree with him that, if this Bill should become law, the mortgagee will look after the renewal of his mortgage and see that renewal agreements or new mortgages are exacted. But that will be beneficial, rather than injurious to the borrower. As the law now is, suppose a man borrows at 6 per cent. for five years. At the end of that term, if the 6 per cent. be satisfactory to him, the lender will allow the mortgage to run on without any renewal agreement. Perhaps, if he insisted on a renewal agreement, the borrower would obtain the money at less than 6 per cent. The borrower, however, carelessly allows the mortgage to run on, but the moment the rate of interest becomes higher, then the mortgagee calls in his money and puts the mortgagor to the expense of making a new agreement and paying an increased interest. Should the rates of interest remain the same or be lower, the mortgagee will not say anything about a renewal agreement at all. As regards the interference with the right to make contracts, more than twenty years ago, the Hon. Edward Blake put an Act through this House, which was actually an interference with that right as is this Bill. Section 10 of that Act says:—

Whenever any principal money or interest secured by mortgage of real estate is not, under the terms of the mortgage, payable till a time more than 5 years after the date of the mortgage, then, if, at any time after the expiration of such five years, any person liable to pay or entitled to redeem the mortgage tenders or pays, to the person entitled to receive the money, &c.

The effect is this, that a man may borrow on his real estate under mortgage for a period of ten or twenty years, during which time he contracts to pay the interest and retain the mortgage. But notwithstanding that contract, this Act, introduced by Mr. Blake, provides that after the borrower has had the money for five years, he may give three months' notice and pay off his debt, and the mortgagee must take the money or the borrower may give three months' interest as a bonus, and pay off his debt at once. If it be right to interfere with a contract in the one case, it must be in the other. That Act, instead of being an injury to the borrower, has been of the greatest possible benefit to him. In Ontario an Act was passed in 1903, which, in so far as it relates to that province, was exactly the same as the one I have introduced to-day, only that in it the period was three months and I make it one month. That Act was introduced by Mr. Lucas, and

has been of great benefit to the borrower. In order to shew you that it would be a benefit to the borrower let me read from two letters written by different loan companies to me concerning loans that they then had in their books. One letter reads:—

We desire to point out that the mortgage is now overdue and can be paid off at any time with a bonus of three months' additional interest.

That is a case where a widow on a farm near my own, had been paying interest at 6 per cent for more than five years. The mortgage was overdue and she, having paid 6 per cent. for a number of years, desired to pay off the mortgage, but the loan company refused in the absence of any such Act as I am seeking to put on the Statute Book, to take from that widow the amount of her mortgage and give her a discharge, unless she paid, as a gift, a quarter of a year's interest which would amount to a considerable sum.

I have another letter from another loan company in Ontario, relating to a farm in Norman, in my constituency. That letter reads:—

Yours of the 8th is to hand enclosing notice from Mr. ( ) that he desires to pay off his loan on 1st of November next. This mortgage matured October 30, 1908, and by the terms of the contract Mr. ( ) will require to pay three months' interest in advance in addition to principal and accrued interest. We cannot accept the notice in lieu of this but will require the three months' interest in advance if the loan is to be paid off.

Under the present Ontario Act, that company would be bound to accept the three months' notice in lieu of the three months' interest, but their mortgage was made before the day of the Ontario Act, and, therefore, they were not bound to obey it. The mortgagee will, in almost every instance, take advantage of his position and of the contract that has been entered into unless there is some law to prohibit him from doing so.

The Minister of Justice (Mr. Aylesworth) has said that the mortgagor and the mortgagee stand upon an equal footing, and, with all due deference to the minister's knowledge of law, I think his address to this House shews that he has not had as much experience in acting between borrower and lender in relation to mortgages as I have had myself. The mortgagor is not on the same level as the mortgagee, nor has he the advantages the mortgagee possesses. The prospective mortgagor goes to the agent of a loan company and makes application for a loan, usually to pay purchase money, or to pay off another mortgage on a certain fixed date. He will

probably go two or three weeks before he requires the money, and make application for the loan. There is nothing whatever in his application to say he must pay three months' interest, or six months' interest, as a bonus to enable him to pay off an overdue mortgage; he does not see that until he comes to sign the mortgage itself, and by that time the loan company have had an inspection of his property made. Even if he takes the trouble and the precaution, which he ought to take, but which unfortunately for himself he often does not take, and has noticed the proviso in his mortgage that if he does not pay off that mortgage on the day it becomes due and desires to pay it off on the following day, or a year afterwards, he must pay a bonus of 3 months' interest or give three months' notice of his intention to do that, and refuses to sign the mortgage, the agent of the loan company will probably say to him: Very well, if you do not sign the mortgage you will have to pay the expenses incurred thus far, including the expense of inspecting your farm. Then, sooner than pay the expense incurred, he signs the mortgage and is subject to its provisions, or it may be that when he discovers what has been inserted in the mortgage, a clause to which he would have objected, there is not sufficient time for him, if he should refuse to sign the mortgage, to make other arrangements and obtain the money that he must have by a certain date.

As to what has been said by the leader of the opposition (Mr. Borden) in reference to consulting the attorneys-general of the different provinces, that was not done in reference to section 10 of the Interest Act, which provides that a man, though he has contracted to keep the mortgage moneys for 20 years, may pay it off and the mortgagee must accept it at the end of five years, this has worked out well; it has wrought no confusion, it has not been objected to by any person or by any attorney-general, and if it was not necessary in one case and no objection was taken to it I think it is quite right to suppose that no objection is likely to be found in this other parallel case.

The whole matter was threshed out pretty well last session, and, as I have said, many men of more experience than the Minister of Justice or the leader of the opposition—and I do not object to any statement made by either of them—but men of much larger experience, men who know more about the whole matter, have stated to me that they find

nothing objectionable or unreasonable in the Bill, and that it is in every way perfectly fair and right.

Motion agreed to, Bill read the second time, and House went into committee thereon.

On section 1.

Mr. Borden (Halifax). I would like to understand the meaning of the words in the first lines of this section:—

> Whenever any principal money, interest or other money secured by mortgage made, or renewed, by renewal or extension agreement, after the passing of this Act is not paid at the time when in the mortgage, or in any agreement for the renewal or extension of the mortgage, the same is stipulated to be due and payable, then, if the person liable to pay or entitled to redeem the mortgage gives the person entitled to receive the money at least one month's notice——

I would like to understand the meaning of the expression contained in the first three lines.

Mr. Miller. "Any principal money, interest or other money." Well, that other money perhaps might be an insurance premium, or it might be taxes.

Mr. Borden (Halifax). What is the meaning of the expression that immediately follows: "By mortgage made, or renewed by renewal or extension agreement?"

Mr. Miller. Suppose a mortgage be made to mature on the 1st of January, 1911, then this Act does not apply. Should there be a new mortgage made on the maturity of that mortgage, that would bring it within the Act. In practice these mortgages are frequently renewed by giving a new mortgage, or by a renewal or extension agreement, which is not registered in the registry office, although each party may have a copy. Now by the renewal of that mortgage by extension agreement, I mean to bring it under the same stipulations as if a new mortgage had been taken.

Mr. Lancaster. I think the hon. member is frustrating the object he has in view. "Made or renewed by renewal or extension agreement." Suppose it is made by a new mortgage, that is a renewal.

Mr. Miller. If it is renewed by a new mortgage after the passing of this Act, then it certainly comes under the Act.

Mr. Lancaster. I do not think this language means what the hon. gentleman intended it to mean, judging from his speech.

Mr. Miller. It means that this Act does not apply to a mortgage made before the passing of the Act unless it is renewed after the passing of the Act.

Mr. Lancaster. What do you mean by "renewed?"

Mr. Miller. By signing or executing a renewal agreement to extend the time whereby the mortgagor agrees to keep the money for a further period, and the mortgagee consents that he shall keep it for a further period. If that is done after the passing of this Act, although it is the same mortgage, and the old mortgage has not been discharged, yet the fact of that agreement being signed, brings that old mortgage within the Act, and gives the mortgagor the privilege of the Act when that second due date comes round, or when the maturity of the mortgage is reached.

Mr. Lancaster. The hon. gentleman makes it clear what he means, but I do not think that this Bill makes it clear. I do not think a Court would say that this language means what he says. "Whenever any principal money, interest or other money secured by mortgage made, or renewed by renewal or extension agreement." Now if it is not made or renewed by renewal or extension agreement, then the Court will say that this Act does not apply.

Mr. Miller. No it does not, of course.

Mr. Lancaster. You are enacting here that subsection 10 is to be affected by the contents of 10a. But we start with a new section. By these words you have to be entirely within all the qualifications of that definition before the Act can apply. I cannot grasp what it does mean. Speaking as a lawyer, I do not believe that a Court would put upon it any such construction as my hon. friend thinks that a Court would put upon it. I think that is a very much restricted operation. You begin by interfering with the rights of contract. Now, the first principle of construction that a Court of law would put upon it, is to limit the qualification as much as possible. By the complication of these words you will cause the Court to say: This does not apply. If there is no question about the extent of this Act, then the qualification is not to apply, because, as I have said, it is an interference with the rights of contract. and the Courts will say that it must be strictly construed. Now, the mortgage must be made or renewed by renewal or extension agreement. What is that to cover? Is that to cover every little agreement that a man has made for extension of time for the payment of interest on certain conditions? We know very well that the principal is not always paid when it becomes due, and it may be that the man does not pay the interest when it becomes due.

It may be an extension agreement has been made, and yet that little extension agreement is only to apply perhaps to a few dollars of interest. Is this Act to apply here? Perhaps the mortgagor forgets to pay the insurance premium, and under the Short Form Mortgages Act of Ontario, if he forgets to pay the insurance premium, the mortgagee can pay that premium and by special enactment, not in the contract, not in the mortgage which the man and his wife have signed, but by virtue of an Act which becomes of the same effect as if it was included in the mortgage, the mortgagee has a right to add that insurance premium as so much principal to his mortgage principal. Now, if he forgets to pay that, and the mortgagee pays it, then the mortgagee says: Well, you did not provide for this premium, it is past due, and I will extend the time for payment; then that additional principal becomes such by virtue of a clause of the Act. That is an extension agreement that extends the time for payment of part of the sum. I voted for this Bill, but I am not in favour of making legislation that is going to get every farmer into a lawsuit with the loan company. The farmer is not going to get any benefit from it, and he will have to risk perhaps his whole farm by carrying a case to the Privy Council to find out how far we have power to enact this legislation. The provincial legislatures deal with these matters, and while I am prepared to go as far as we can in using our jurisdiction to remedy an evil, I want to be careful that we are not going to get the borrower into such a position that he will be encouraged to go into a lawsuit with the loan company, and after he has lost his farm, will find out that the Act does not mean what my hon. friend thinks it means. I think that we ought to recast this section so that the leader of the opposition, myself and other members of this House can all understand it to mean exactly what the hon. gentleman does, because I am inclined to say, that I cannot be sure if the Court will put any such construction upon it as the proposer of the Bill does.

Mr. Carvell. The object of the Bill is simply to provide for the case of a mortgage not being paid when due, or at the time to which it has been extended by agreement. I appreciate the objection which has been raised by the hon. member for Lincoln (Mr. Lancaster) and I think that if we would recast just the first three or four lines it would obviate

all this difficulty. I would suggest that it might be recast in this way:—

Whenever any principal money or other money secured by mortgage made after the passing of this Act or hereafter renewed by renewal or extension agreement thereof.

Mr. Borden (Halifax). I appreciate the object which the hon. gentleman (Mr. Carvell) has, but I am bound to say that the drafting of this Bill, including some of the expressions that the hon. gentleman proposes to retain, seems rather of a slangy description. I do not know the practice in other provinces, but in the province of Nova Scotia, I have never heard the expression: "Extension agreement." When that came up for construction before a Court of that province some of the Judges might say that they had heard of extension tables but that they had never heard the term "extension agreement" used.

Mr. Carvell. It is used in practice.

Mr. Borden (Halifax). It is not used in my province.

Mr. Carvell. It is quite common.

Mr. Borden (Halifax.) Is it common to the law.

Mr. Carvell. It is very common in practice.

Mr. Borden (Halifax.) Is it used in legal documents?

Mr. Carvell. Yes.

Mr. Borden (Halifax.) I have never heard it.

Mr. Carvell. I have drawn up lots of documents containing it.

Mr. Pugsley. You might get over it by calling it an "agreement to extend the time for payment."

Mr. Borden (Halifax.) I suppose the Minister of Public Works will appreciate the suggestion that I have made.

Mr. Pugsley. I have never heard it called an extension agreement before, but I should think that you could say an "agreement to extend the time for the payment of the principal money."

Mr. Borden (Halifax.) Something of that kind so that we could have an intelligent idea of what it means. We might call it an extension agreement if we desired to do so, but when we are going to prepare a statute which has to be considered by the Courts we should be more particular."

Progress reported.

CURRENT COMMENT.

CHEAP LAW.—A correspondent writes us that when he was a law student in the office of Premier Murray of Nova Scotia, a man from the country called to get some advice. Telling his difficulties, he said he was a justice of the peace and had the Revised Statutes, and could of course read them but he could find nothing in the statutes to help him in connection with a case then before him. A man had been accused of breaking another man's boat, and the justice of the peace said he could find nothing in the statutes referring to such an offence. He finally said: "To tell you the truth, young man, I would like to get a copy of 'the law simplified' in pamphlet form if such a book has ever been written."

ADVERTISING ON LETTER-HEADS.—Some Canadian solicitors are fond of having printed as part of the heading on their letters that banks A. B. C. and companies X. Y. Z. are their clients. The names of individual clients doubtless, not being considered of sufficient weight or prominence so far as we have observed, are never seen. It has been left, however, to an American lawyer to announce to his legal brethren that he has a peculiar "specialty," for in the upper right hand corner of his letter paper, appears the interesting announcement "that he is a grower and shipper of Indian river pineapples and string beans."

AVIATION LITIGATION.—We believe that the following editorial from *Puck* may well be brought to the attention of the Bar in general: "There are good times coming for the legal profession. The young lawyer, waiting in the proverbial manner for his first client, will have but a little longer to wait. Already the hum of industry in the law school mills grows louder, and all because of an unheralded event in aviating, an event that marks an epoch in the annals of litigation. For the first time in the history of aviation, says a momentous dispatch, a lawsuit has been brought be-

cause of a collision between two biplanes, a passenger in one of them having had the misfortune, or the tremendous distinction, to break his leg, and "the case is now in Court." Future historians will reverence the day; future statisticians will record the hour; for there will be other damage suits undoubtedly. We who have read the air-news of the day with an eye to speed and distance only have been blind to this inevitable by-product of aviation. The first damage suit over a bumped cow, however, did not at once suggest to the people of early railroading days an endless line of plaintiffs and defendants, so our own failure to forecast in the case of aëroplanes is perhaps not surprising. Now the honour of prophecy is an empty one. The first case is on the calendar. The legal profession, we trust, will not be unmindful of its responsibilities. While the congesting of the air by fluttering bird-men will increase steadily the opportunities for legitimate legal practice—for instance, the damage suits arising from badly aimed bombs at military manœuvres—it will also render necessary on the part of Bar associations a strict enforcement of the code of professional ethics. We confidently assume that, in the event of collisions, disputes over the right of way, and the like, air-men will be permitted to descend to earth before they are handed a professional card or asked to part with a fat retaining fee. The aëroplane successor to the "ambulance chaser," hovering about the atmosphere in his search for possible clients, would be intolerable. Let the Bar anticipate these impending evils. Let it take time by all his forelocks. Otherwise, it will be our painful duty to advise all prospective air litigants to settle out of Court."

"AND YOUR PETITIONER WILL EVER PRAY, &c."—What is the meaning of "&c."? West's "Symboleography." published in the reign of Elizabeth, gives many forms of the common ending, and some of them are set out by Mr. W. P. W. Phillimore in "Notes and Queries." vol. IX., at p. 184, as follows:—

"And your said almoner shall pray unto Almighty God for the prosperous estate of your Majestie according to his most bounden duty in most high honour and felicity long to reign over us."

"And your said suppliant shall daily pray unto God for your highnes prosperous estate in royaltie long to reign."

"And your said subject shall daily pray to God for the prosperous estate of your Majesties Rayne."

"And your said humble subject shall daily pray to God for the preservation of your highnesse in all felicitie most happily long to reigne."

"And your supplyant shall daily pray for your honor."

"And your supplyant as nevertheless by duetie bounden shall daily pray to God for the increase of your Honour."

It is evident that the "&c." may be filled up according to individual fancy.

MISUSE OF WORDS IN LAW.—Those who look to the law profession for a livelihood may "thank their lucky stars" that the average layman, disregarding "precept upon precept," stumbles on in the misuse of the English language, since such misuse, exemplified in home made contracts, deeds, and wills, affords much litigation, with attending fees. But words are the lawyer's and the Judge's tools, and, if either does not know how to use them, he endangers his own success and the interests of those depending upon his acts and judgment. "Here one poor word a hundred clinches makes." Three faults frequently found in language used in the law are tautology, prolixity, and the use of inappropriate words. All three of them discredit the offender intellectually to a greater or less extent; but the last mentioned is the most grievous, in that it frequently results in disastrous litigation, especially in cases of contracts, deeds and wills. To illustrate Mathews in his "Words: Their Use and Abuse," tells of an English woman, who, desiring to leave her clothing, etc., to a servant, described them in her will as "personalty," and unwittingly included in her bequest nearly $50,000.

Real estate is not "bequeathed;" personalty is not "devised;" and a testamentary donee of personalty is not a "devisee." "Personalty" is not the same as "personality."

The plural of "cestui que trust" is "cestuis que trust" not "cestuis que trustent."

One's main calling is not his "avocation," and his secondary occupation is not a "vocation."

"Balance" is improperly used to denote the "remainder" of a thing when part is taken away.

A "depositary" is one with whom a thing is deposited; a "depository" is a place of deposit.

"Party" is not a synonym of "person;" its meaning being restricted to one who participates in a cause, action, contract, etc.

"Providing" is often improperly used as a conjunction, instead of "provided."

"Deceased" is commonly misused to designate a decedent, though not authorised by the dictionaries as a noun.

When properly used, "vendor" implies a sale of real estate, and "seller" a sale of personalty. The best usage approves "buyer" as designating one who acquires personalty, and "purchaser" as designating one acquiring real estate, rendering "vendee" obsolescent.

Some appellate opinions recite that the "case" is affirmed or reversed, when obviously "judgment," or "order" is meant.

"Elect" implies a vote, generally popular, though sometimes more restricted, and is not synonymous with "appoint," or other modes of filling positions.

"Marital" is properly applied only to the husband's relation, while "matrimonial" may be used respecting him or the wife, or the marriage relation generally.

"Accused" is more appropriate than "defendant," in speaking of one charged with an offence, in that it implies a criminal case.

"Per," being a Latin preposition, is properly joined with Latin words only: "Per diem," or "for a day;" "per annum," or "for a year."

A decision may "conflict" with a decision of a co-ordinate or independent Court, but cannot "overrule" it.

"Et al.," though brief, is ambiguous, in that it does not indicate whether "and another" or "and others" is meant. "Et als." is a mongrel, being Latin on its mother's, and English on its father's side. In one appellate Court "etc." is required to do the duty of "and another" and "and others" in the title of cases.

Property is not divided "between" several persons, but "among" them.

An offer to do an act is a "proposal," and not a "proposition."

Money is "lent," and not "loaned."

An utterance by word of mouth is "oral," while anything written or spoken in words is "verbal."

"Plead" is improperly used in the past tense.

"Relative" is better than "relation," in speaking of one's kindred.

"Number" is not synonymous with "several."

Confusion of the little words "or" and "and" in statutes and contracts has furnished the basis of many legal controversies.

Though "Mr." is in a sense a complimetary term. an appellate Judge recently referred in his opinion to one whose conviction of a felony was affirmed as "Mr. Pirkey."

In statements of facts on appeal, identity of the parties is frequently obscured by referring to appellant in one place as appellant. in another as plaintiff; to defendant as accused, and in another as Jones, or whatever his surname may be.

The chief evils of Tautology, and his half-brother, Prolixity, lie in the lengthening of sentences, and the consequent tendency to obscure the idea intended to be conveyed. As Southey says: "If you would be pungent, be brief; for it is with words, as with sunbeams, the more they are condensed, the deeper they burn." And as another has said: "He that uses many words in explaining a subject doth like the cuttle-fish hide himself for the most part in his own ink."

Here are some common tautological blunders gleaned from the opinions of the appellate Courts: "Conspire together," "verdict of the jury," "oral testimony," "instructions to the jury," "findings of fact," "testimony of witnesses," "conveyed away."

The following are very common examples of prolixity, to be found in briefs and judicial opinions:—

"Notwithstanding the fact," for "though." "Guilty of negligence," for "negligent." "In pursuance of the provisions of," for "under." "A man by the name of," for "a man named." "A contract for the construction of," for "a contract to construct." "For the purpose of," for "to." "By reason of which," for "whereby." "By reason of the fact that," for "because" or "since."

COURTS AND PROCEDURE IN GERMANY.

The safeguards of justice differ according to the different views of the nations. The American people believe in the sound mind of their jurors even to the undervaluing of their learned lawyers. The English trust their troubles to the clean hands of their unique barristers, who not hindered by passion and party influences, are the matchless helpers of the great English Judges. In Germany the administration of justice in its broadest sense lies not in the Bar but on the Bench. Here the Judge is not so much a ruler as a worker.

It may be mentioned at the outset that the German Judges are not taken from the Bar but that their career is an independent one, those who strive for a place on the Bench serving as assistant Judges for a number of years until they are appointed Judges for lifetime by the Crown.

The working field of the German Judge compared to that of his Anglo-Saxon colleague is broadened by his employment in the so-called non-contentious jurisdiction of the German Courts, consisting in the registration of real rights, in matters of guardianship, administration of the estate of a deceased person, opening and publication of wills, division of estates among co-heirs, issuing of certificates of inheritance, registration of marriage contracts, and of firms, of companies and corporations, of mines and ships. All these acts and numerous others of a similar nature are performed and—to be valid—must be performed before the Court of first instance (District Court), sitting in Chambers. In the district of Berlin Centre, which numbers about one million inhabitants, twenty Judges are exclusively engaged in this class of judicial work. Most of this is done with the parties themselves, who prefer to talk things over with the Judge and to rely on his advice rather than to employ costly advocates.

As to the contentious jurisdiction (civil and criminal cases) the same is true to a certain extent; a considerable part of the work performed by the Anglo-Saxon lawyer is done by the Judge, and in criminal matters by the state attorney, whose duty compels him as well to defend the prisoner as to accuse him.

In the following lines I shall confine myself to a short description of the Court work, the relations of Judge and counsel, and the safeguards of justice in civil cases.

In Germany the ordinary jurisdiction in civil cases is exercised by a uniform system of four grades of Courts: the District Courts, Superior Courts, Courts of Appeal and the one Supreme Court.

The District Courts, the number of which is about fifteen hundred, have original jurisdiction in civil proceedings of every kind if the matter in controversy is not more than one hundred and fifty dollars in value. The number of Judges engaged in this work varies according to the population of the district. The District Court at Berlin Centre, for instance, numbers nineteen Judges engaged with civil procedure; each sitting alone, three times in the week, trying from thirty to sixty cases every session. The cases are divided in alphabetical order, governed by the first letter of the defendant's name, according to which method the Judge after a time comes to know the persons who are sued more frequently, especially those foul debtors who defend their suits only to gain time.

The second part of the judicial construction is occupied by the one hundred and sixty superior Courts, which are collegiate Courts composed of a president and a number of associate Judges divided into "chambers." All these decisions are given by three Judges—one "chamber." The superior Courts have original jurisdiction over all civil proceedings if the amount in controversy is more than one hundred and fifty dollars, and appellate jurisdiction over the appeals from the District Courts.

The twenty Courts of Appeal have only appellate jurisdiction. They are collegiate Courts, divided into "senates;" their decisions are rendered by five Judges.

At last, the dome of the construction, the Supreme Court, has jurisdiction of appeals from the Courts of Appeal. Its decisions are given by seven Judges.

In all the upper Courts the cases are divided according to the subject-matter. One Chamber or Senate tries cases on agency, another, cases on negotiable instruments law, a third, cases on real property, etc. In consequence the members of the different divisions become specialists in a certain province of the law.

About four thousand Judges are employed in this machinery, while outside this only ten thousand practising attorneys are to be found in the whole of Germany. In the comparison of these numbers we see the vast difference between

the German and the Anglo-American system. While in London 500 lawyers keep one Judge busy and in Chicago the percentage is 130 to 1, in Germany five lawyers seem to be sufficient to fill the time of two Judges, and still German lawyers are no magicians, and the German Judges' time is well taken up. The explanation of this amazing difference is the fact mentioned before, that a large part of the work belonging to the English and American advocates is done by the Court in Germany. This is especially true as to the District Courts, where the plaintiff and the defendant may pursue and defend their cases without the assistance of a lawyer; while in the upper Courts they are obliged to employ counsel. This possibility of pleading one's own case is taken advantage of by the parties in at least half of all cases tried before the District Courts. First of all, those actions which probably will end in a judgment on default are almost invariably brought by the party. Large firms usually engage one of their subordinate employees with this work, which, according to the absence of procedural technicalities, can be done by any layman; but also a very large part of the contested cases are fought by the parties themselves under the guidance and with the assistance of the Judge, as I shall shew later. The possibilities of saving counsel's fees and the fact that the Court's fees are very low render the procedure most inexpensive, so that it pays to sue even for the smallest sum. This method fulfils a social theory which is a rather doubtful good, perhaps, in so far as that it induces the citizen to waste valuable time in petty matters of litigation.

To shew the Court's and the lawyer's work more plainly, let us contemplate the course of a German lawsuit. Suppose a manufacturer wants to sue the buyer for the price of goods sold and delivered. The first question would be in which Court he must bring his suit. If the amount is more than one hundred and fifty dollars it is apparent that he must sue in a superior Court; if the amount is less, he must direct his complaint to a District Court. As to the location of the Court, the suit may and usually is brought in the district of the defendant's residence; and it may also be brought where the obligation of the contract was to be fulfilled. If the action is based on tort it may be brought where the tort was committed and if the claim is about the ownership or possession of real estate it must be brought where the latter is situated. These—not regarding some exceptional cases—

are the simple rules governing the jurisdiction of the Courts and due to their simplicity it seldom happens that the jurisdiction of the Court is contested. If this happens, however, and the defendant is successful in proving that the suit should have been brought in another jurisdiction, the case is not dismissed but simply transferred to the proper Court on motion of the plaintiff.

The first procedural step of the plaintiff is filing the complaint, a written pleading containing the names and addresses of the parties as fully as can be done and the statement of the Court of the nature of the claim (damages, specific performance, etc.), of the facts which justify it, and the means by which the plaintiff wants to prove these facts (the names of witnesses), an exact demand, and finally a request addressed to the defendant to appear before the Court on a certain date, the setting of which is left to the Court. For example:

Complaint—

Of the firm Chas. Meyer of Leipzig, Roon Str. 11 v. the storekeeper Wm. Miller of Berlin, Wane Str. 15.

Before the Superior Court of Berlin.

In May, 1909, the defendant ordered from the plaintiff's agent at Berlin two cash registers, price $200.

Proof—testimony of agent Smith, Berlin, Baum Str. 13.

The goods were delivered in June, 1909.

Proof—as above and oath.

Plaintiff asks judgment for $200, and four per cent. interest since October 1, 1909.

Plaintiff requests the defendant to appear before the Superior Court of Berlin on such date as the Court will hereafter determine.

(Signed) CHAS MEYER.

This is an example which can be used *mutatis mutandis* for any case brought in the Superior Court. No special forms of action and no legal conclusions are required. The facts may be stated as simply or as extensively as the plaintiff desires. No multifariousness, no ambiguity, will threw his complaint out.

It is not only the right, but the duty of the Court to pick out the material facts and in the case of ambiguity or missing links to make clear or fill up by questioning the parties at the trial in open Court. This extremely important rule of procedure places the responsibility of a full treatment of

the case on the shoulders of the Judge and lightens the obligations of party and counsel. It protects the parties from their own lack of knowledge and logic. It protects them also from the inability of attorneys as well as from their carelessness. On the other hand, it is apt to create a certain indifference on the part of parties and even of counsel.

The plaintiff files the complaint and two copies of it in the clerk's office; the presiding Judge sets the case for trial on a certain date and hour—about fourteen days after the filing of the complaint. One copy of the complaint is kept in Court; the original and the other copy are returned to the plaintiff with a note of the trial date. The plaintiff keeps the original for himself and has the other served on the defendant by the bailiff.

In actions before the District Court, procedure is still more simple. A mere statement of the names of the parties, of the Court and a short formless statement of the facts is a sufficient complaint. A simple letter like the following would be sufficient to start the machinery of the Court.

To the District Court at Berlin Centre:—

I want to sue Mr. Brown of Berlin, Friedrich Str. 112, who owes me fifty dollars ($50) for a blue overcoat.

(Signed) TAILOR SCHULTZ, Berlin (Westend).

Here neither an exact demand nor a request to appear, nor copies are necessary. The latter are furnished by the Court, the date of the trial is set, one summons is served on the plaintiff and one on the defendant by order of the Court and without special charge.

The defendant who wishes to defend the case may, in the Superior Court as well as in the District Court, file an answer, but is not obliged to do so. It would be sufficient if he appears by his lawyer, or in the District Court personally, on the date of the trial. As a rule, however, in cases before the Superior Court, answers are filed in most of the contested cases. The plaintiff usually files a reply and frequently ten to twenty pleadings are exchanged in the course of the proceedings. If the parties consider it necessary so to prepare the trial, they do not appear on the first trial-date, but ask for an adjournment, which is granted as a matter of course.

The pleadings are governed by no technical rules whatsoever. There is no distinction between answers and demurrers, between general and special denials, etc. The answer may

ask for the dismissal of the suit on legal reasons or may bring up new facts, and may state them in the most immaterial and ambiguous manner. The latter brings no harm to the party —the law trusts the Judge to work his way through and find the issue without being led there by the parties. Moreover, the parties are not bound in any way by the allegations and statements in their pleadings; they may withdraw, change and amend them either in a following pleading or in open Court as they please, the only exception to this rule being formed by the complaint, which may be amended at liberty, but not changed so much that the cause of action becomes a different one—though even this may be done if the defendant agrees or the Court grants it on special motion. This utter simplicity of the law of pleading makes it practically imposible to commit formal mistakes and to expose oneself by this to procedural disadvantages or to give a chance to the other side to delay the case by technical objections.

In the District Court every pleading as it comes in is laid before the Judge, and in the Superior Court, before the presiding and one associate Judge. These study the case as it goes along, and as a rule work out an "opinion" (votum) before the trial day arrives. At the hour set for the case it is argued briefly by the parties or their lawyers. Witnesses are as a rule not present. After the argument the Court announces its view. If the case is already now ripe for the final decision, because of some mere legal reason—as for instance limitation—judgment is rendered at once. If not, the Court states which allegations are material in its opinion, makes clear which allegations are undisputed and which contested and points out in which respect it considers amendments necessary. After this the Court announces which allegations are to be proved by the plaintiff or defendant, formulating these allegations distinctly. It announces at the same time what testimony shall be taken for this purpose, naming the witnesses to be heard, describing the documents to be produced by a party, or appointing any experts whose information may be considered necessary.

One sees that by this method the case is taken out of the hands of the lawyers and delivered to the cunning and legal knowledge of the Judge. He leads the current of the suit in a certain direction, eliminating every point and every evidence which seems immaterial to him. The parties may protest against his standpoint and may try to induce him to

admit further evidence on points eliminated by him or more evidence on the points considered material by him. They are confined, however to suggestions; no exception lies against the ruling of the Judge at this stage of the proceeding.

The witnesses and experts named or appointed by the Court, and only these, are summoned by the same on a certain day and are examined by the Judge or presiding Judge on the questions formulated beforehand. This proceeding forms one of the most striking differences between the Anglo-American and the German system of procedure. The latter is marked by the absence of cross-examination, of rules of evidence, and by the absolute power of the Judge to determine which questions he will put before the witnesses. The lawyer may suggest other questions, but it is left to the Court whether it considers them material or not. The Judge has to form his opinion after a free consideration of all the evidence taken by him, and of the circumstances of the case. As to how this opinion is gained is entirely his own matter. He may rely on hearsay-evidence, he may disbelieve a dozen of sworn witnesses and believe the one, who—because of being the plaintiff's wife—has been examined without being sworn. He may even refuse to believe any witnesses at all and form his opinion on the circumstances of the case. As to the expert-evidence, the experts are not furnished by the parties, but nominated by the Court unless both parties agree upon one expert.

An important provision of the law of evidence is that the parties cannot be heard as witnesses. Instead of this the code provides the following method: If a material fact rests only on the knowledge of the parties themselves, the one of them who has the burden of proof may formulate that fact exactly and precisely and request the opposite party to deny it under oath in open Court. If the opposite party refuses to do this, he is deemed to have admitted the truth of the fact; if he denies the fact under oath, he proves by this the untruth of the other's allegation to the exclusion of counter-evidence. This method is undoubtedly a rather poor supplement for the Anglo-American party-testimony.

The part played by the lawyer in this stage of the procedure is again very modest. Procedural difficulties are not likely to arise.

After the testimony is taken, the Court usually adjourns to give the parties a chance to offer new or additional evi-

dence, which may be taken or not, as the Court decides. Before the judgment is rendered, both parties sum up the case in a—as a rule—short argument.

.Within one week after the decision has been announced by the Court, the Judge—in the Superior Courts one of the associate Judges—has to work out the co-called "Urteils-Gruende" (reasons of the decision). They begin with a statement of the undisputed facts, set out the contested allegations on both sides, the testimony taken by the Court, and are concluded by a systematic and elaborate argument, giving the legal points on which the decision is based. This forms a very important part of the Judge's daily work and does away altogether with the "record" of the case in the Anglo-American sense, being in itself a complete record of all the happenings since the filing of the complaint. The parties have one week's time after the publication of these reasons to move for a correction of the statement of the facts contained therein, the granting of which motion is left to the discretion of the Court. The statement as it stands after this—with or without correction—furnishes absolute proof that the allegations stated thereby have been before the Court and that nothing else has been alleged. The purpose of these "reasons" is to give a clear picture to the parties of what has happened in the course of the procedure, to shew them how the Court views the case, and what their chances of an appeal may be. Besides this they are important to control the Judge's discretion and to shew sufficient legal consideration of the case.

An appeal lies from the decisions of the District Court to the Superior Court, and from those of the latter to the Court of Appeals as a matter of right. It is exercised by filing and serving an informal pleading. The upper Court handles the appeal in exactly the same manner as the lower Court has handled the case in the first instance. It is not bound by the facts stated by the lower Court, nor by the evidence taken there. It may believe in the truth of the testimony taken below or may examine the same witnesses and experts again, or hear new ones. The procedure before the upper Court is accordingly a mere repetition of the procedure below. Technical difficulties are again not likely to arise.

The decisions of the Superior Courts as appellate Courts are final, while from the judgments of the Courts of Appeal, a writ of error lies to the Supreme Court as a matter of right,

if the amount in controversy is more than one thousand dollars' worth. The Supreme Court is bound by the facts stated in the decision of the lower Court, and has to examine only the law of the case.

This short picture shews that the Alpha and Omega of the German procedure is simplicity. The danger of procedural mistakes committed by the parties is almost eliminated, the possibility of making blunders being reserved to the Court which, however, owing to the absence of rules of evidence and of technicalities, rather seldom fails in the point of procedure. If it does, the substantial interests of the parties are protected from mere procedural attacks by the provision that every procedural irregularity is cured, if the point is not raised immediately. It is obvious that the German system does not permit the form to kill the substance, and gives little opportunity to the skilful lawyer to annoy the opposite party by procedural traps and pitfalls.

On the other hand it cannot be denied that the preponderance of the Judge over the attorney is a doubtful good. The German method is not likely to raise a great number of eminent jurists at the Bar, and first of all makes it necessary to keep a very large number of Judges on the Bench. In consequence, the average Judge is only an average jurist, while he should be as pre-eminent over the members of the Bar as his procedural authority outweighs them. This disadvantage of the system increases with the growing population and the accordingly growing number of Judges.

The last years have shewn a powerful movement toward decreasing the judicial army, but as this could only be done by unloading part of their poorly paid work on the shoulders of the much better paid counsellors and thus increasing the costs of litigation—a proposition to which the parliaments are utterly opposed—there is little chance of a change in the system at the present time. It must be remembered here that the salaries of the German Judges are comparatively smaller than the income of a practising lawyer of average ability. The German Judge is accustomed to work "pour le roi de Prusse," which means for little money, but with great enthusiasm and faithfulness, qualities which originate in the traditions of the calling,—historical traditions which cannot be explained, but are there and form the necessary condition and the strength of the present German judicial system.

KARL VON LERVINSKI.

The Library

"And what of this new book?"—*Sterne.*

"Men disparage not antiquity who prudently exalt new enquiries."
—*Sir Thomas Browne.*

Outlines of Constitutional and Administrative Law. By DALZELL CHALMERS, Barrister-at-Law. London: Stevens & Haynes. Toronto: The Carswell Co., Ltd. Price, $1.50. 1910.

This little handbook is written mainly for students at universities and law schools, and is intended to give a general view of and a preliminary acquaintance with a subject, intricate in many of its aspects. After briefly discussing the characteristics of the English Constitution, the author considers the following topics at length (a) the subject (b) the Crown, (c) judicature, (d) parliament, and (e) local government. Frequent references are made to the standard works by Anson, Dicey, Lowell and Odgers.

Digest of the Law of Discovery with Practice Notes. By HIS HONOUR JUDGE BRAY. Second Edition. London: Sweet & Maxwell, Ltd. Toronto: The Carswell Co., Ltd. Price, $1 net. 1910.

The title clearly indicates the nature of this little work. The learned author first deals concisely with the law of discovery under four divisions, viz., (1) discovery generally, (2) interrogatories, (3) discovery and production of documents, and (4) objections to discovery. The second part of the book contains notes to order 31, which have been thoroughly revised. Our readers will find this work exceedingly handy.

RECENT ENGLISH DECISIONS.

L appointed one of his sons, X, to be a trustee of his will, and thereby also nominated X to be a partner in L's firm as a trustee for himself and other beneficiaries. X accordingly became a partner on L's death, and agreed with his co-partner to continue an arrangement which had existed in L's lifetime under which X acted as salesman to the firm and received a salary for his services. Warrington, J., holds that X need not account to L's estate for the salary as a trustee. *Re Lewis, Lewis* v. *Lewis,* W. N. 217.

A settled fund was invested upon mortgage. The money being paid, the trustees executed a reconveyance and handed same to their solicitor to complete the matter. He retained the deed for four months, during which time he received and misappropriated part of the money. Shortly after the signing of the deed one of the trustees died and the survivor repeatedly inquired whether the money had been paid off, but the solicitor always said that the matter had not been completed. This was an action by a beneficiary to make the trustee liable for the loss. Parker, J., holds that although the trustee knew that the solicitor had been dilatory and unbusinesslike in the matters of another trust, yet, as he had no knowledge which would lead him to suspect the solicitor's honesty, he was justified in leaving the reconveyance with the solicitor to be used as required, and that his allowing the money to remain for sometime in the solicitor's hands did not disentitle him to the protection given by the Trustee Act, 1893, s. 17, since he did not know that the money had been repaid, and had no reason for doubting the solicitor's replies to his queries. *Re Sheppard, De Brimont* v. *Harvey,* 55 S. J. 13.

Eve, J., holds that where a testator bequeaths a legacy of £15,000 to each of his sons who attain the age of 25 years, and a further legacy of £15,000 to each of his sons who attain the age of 30, and the testator also bequeaths a share of residue to each of his sons, that the legacies do not carry interest. *Re Abrahams, Abrahams* v. *Bendon,* W. N. 236.

A piano held by a tenant under a hire-purchase agreement from the plaintiff was seized for rent. A member of plaintiff's firm signed a declaration which was not in the form prescribed by the Statutory Declarations Act, 1835. The declaration was disregarded by the bailiff, and the plaintiffs sued him to recover the piano or its value. The Court of Appeal holds that the declaration was valid, that a statutory declaration under the Law of Distress Amendment Act, 1908, must not necessarily be a statutory declaration within the Act of 1835, or, if made in the interest of a firm, be signed by all the partners in the firm, and that the words "made by such tenant" in sec. 4 (1) of the Act of 1908 did not render goods exempted by s. 1 of the Act liable to seizure, as the words must be read as applying to all that went before—not only to "settlement," but also to bill of sale and hire-purchase agreement. Section 4 intends that goods are not to have the benefit of s. 1 where the tenant has made any arrangement with regard to the goods by way of bill of sale or hire-purchase agreement. *Rogers* v. *Martin,* W. N. 223.

Plaintiffs were the owners of a steamship which was proceeding to a berth on a staith for the purpose of taking in a cargo of coals. Two workmen in plaintiffs' employ were in a boat taking a hawser from the vessel to the staith when, in consequence of negligence on the part both of the defendants' servant employed at the staith and of the officers employed by plaintiffs in charge of the vessel, the boat was upset, with the result that one of the workmen was drowned and the other injured. Plaintiffs therefore had to pay compensation under the above-mentioned Act and they now sued defendants for indemnity. The Court below held that plaintiffs having through their servants been guilty of negligence contributory to the accident, were not entitled to be indemnified. An appeal to the Court of Appeal was dismissed. *Cory* v. *France,* W. N. 215.

This was a claim against the administrators of a collier who had died of apoplexy while engaged in building a "pack," i.e., a stone wall, filled with rubble, about 6 ft. high, involving lifting stones of various sizes and involving heavy strain. The medical evidence shewed that deceased's arteries were in such a very diseased condition that apoplexy might have ensued at any time, and there was no evidence that the

seizure came upon him when deceased was incurring a strain. The County Court Judge had found that the man's death was not the result of a blow or fall, but was caused from apoplexy brought on by a strain while engaged in the heavy work of building the "pack." Held, by the House of Lords that there was no evidence to support the County Court Judge's finding, the evidence of the cause of death being equally consistent with an accident and with no accident. In cases under the Act, as in other cases, the onus of proof rests upon the applicant. Consequently the claim failed. *Barnabus* v. *Bersham Colliery,* 130 L. T. 54.

L while passing through W's field was attacked by W's savage horse and injured. L had no right to be in the field, which, however, was habitually used by the public as a near cut to a railway station. W knew that the public were in the habit of going into the field and that the horse was savage. The House of Lords holds that W is liable in damages. Notwithstanding that L was a trespasser as W knew that persons constantly crossed the field that placed a duty on him to see that they were not exposed to a danger the existence of which they were not warned against. Persons who used the field ought to have been warned of the danger and W was held to be liable as he owned a duty to the public which he failed to discharge. *Lowery* v. *Walker,* W. N. 241.

C sued R to recover money due under a bill of exchange payable on demand, and applied for judgment under Order XIV. The affidavit in support of the summons was made by C's solicitor, who swore to the facts, but did not state the means of his knowledge nor that he was authorized to make the affidavit by the plaintiff and made it on information supplied by him for that purpose. The Court of Appeal holds that as the defendant admitted that the facts deposed to were true, the Judge was right in accepting the affidavit as sufficient to support the summons. *Chirgwin* v. *Russell,* 55 S. J. 10.

The client claimed from the solicitor by originating summons (1) delivery of a cash account, (2) taxation of certain delivered bills, and (3) leave to dispute retainer in respect of matters to which the costs related. A question arose as

to whether the common order for a cash account was sufficient. The client contended that it was insufficient, and that an order for a general account was necessary. Neville, J., made the order, but *Re Smith* (9 Beav. 182), is no longer to be taken as a binding authority upon the practice in this respect. The rule is to be found in *Le Brasseur & Oakley* (1896, 2 Ch. 487), where it is stated that everything must be brought into the common cash account except items against which the solicitor if sued by the client could not set off his costs when taxed. The costs of the summons were therefore reserved until it could be seen whether there were any items to be accounted for which would not be included in the usual order for a cash account. *Re Lymn,* 130 L. T. 9.

Where a motion has been launched against a sole defendant for a receiver in respect of property alleged to be in his hands as trustee, Warrington, J., holds that the Court has jurisdiction, in spite of the abatement of the action caused by his death, to appoint a receiver, to protect the property pending the constitution of a representative of the deceased. The receiver was appointed until 10 days after probate, the plaintiff undertaking to apply for administration with the will annexed if probate was not granted within two months. In all other respects the order followed that in *Re Parker* (1879, 12 Ch. D. 293). *Re Clark, Clark* v. *Clark,* W. N. 234.

A shareholder of a company is not debarred according to a Divisional Court from claiming an injunction to restrain a company from acting on an *ultra vires* resolution by the fact that he has himself been a party to the passing of the resolution, and has assented to previous illegal acts done under it. *Moseley* v. *Koffyfontein,* 55 S. J. 44.

This was a petition for the compulsory winding-up of the company brought by a solicitor who had recovered judgment for costs amounting to £41. Neville, J., holds that the practice of the Court is not to make an order on petition for winding-up where petitioner's debt is less than £50 unless there are special circumstances which did not appear here. *In re World Industrial Bank, Limited* (1909, W. N. 148), an order was made by Neville, J., because there the company was using the practice of the Court to enable them to refuse to pay a debt when they had sufficient assets, and in another

case the learned Judge had made an order where it was apparent the company could never commence business. *Re Industrial Insurance Association, Limited,* W. N. 245.

A company at the date of its winding-up was possessed of certain debentures to which no value had been attributed in the balance sheets. These debentures were subsequently realised by the liquidator in the winding-up. A Divisional Court holds that the proceeds realised should be treated as undrawn profits arising from the company's business. *Re Spanish Prospecting Company, Limited,* W. N. 241.

CORRESPONDENCE.

Mr. G. E. Wire, deputy librarian of the Worcester County Law Library, Worcester, Mass., writes us as follows:—

"Current number, December, 1910, of CANADIAN LAW TIMES reaches us this a.m. In looking it over I find on pages 1016-1017 a note "Exeter Conference" quoting from the "Library World" reflecting somewhat on the American representatives at that conference. I was not there but I am familiar with the "Library World" having read it for years and finally discontinuing it because of its harsh sayings and unfair treatment of their own brethren. Nothing really suits it so far as I know. The accounts of this Exeter meeting in "Library Journal and "Public Libraries" agree that it was a good meeting and both speak of this critical, and more than that needless, fault-finding spirit of the "Library World." It seems to me that if the writer had been more acquainted with the domestic economy of the "Library World" he would not have placed so much credence in its remarks. I am sure none of our U. S. librarians who were there indulged in "empty talk," and as a general thing, librarians do not indulge in it. I have attended scores of library meetings and speak from experience—I am grieved at such reflections in your periodical."

The
Canadian Law Times.

VOL. XXXI. FEBRUARY, 1911. No. 2.

BLANKS IN NEGOTIABLE INSTRUMENTS.

What are the rights of the holder of a negotiable instrument which was in an incomplete state when it left the possession of the maker or drawer? The relevant provisions of the Bills of Exchange Act are sections 31 and 32, corresponding to section 20 of the English Act, and sections 14 and 15 of the Negotiable Instruments Law.[1]

31. Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount, using the signature for that of the drawer, or acceptor, or an endorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit. 53 Vict. ch. 33, sec. 20. cf. Eng. sec. 20; N. I. L. sec. 14.

Prior to 1906 this section and sec. 32 constituted one section. The two sections must be read together, for the completed instrument cannot be enforced against any person who becomes a party to it prior to its completion, unless it is filled up within a reasonable time and strictly in accordance with the authority given or unless, after completion, it is negotiated to a holder in due course (sec. 32.)

The English Act provides that where a simple signature on a blank stamped paper is delivered, etc., it operates as a *prima facie* authority to fill it up as a complete bill for any

[1] Now adopted in the District of Columbia and many of the United States. The section-numbering referred to is that of the original Model Act as prepared by the Conference of Commissioners on Uniform State Laws. In New York the corresponding sections are numbered 33 and 34.

amount the stamp will cover, etc. The Negotiable Instruments Law agrees in this respect with the Canadian Act.

Section 30 provides for the special case where a bill payable after date is issued undated or an acceptance payable at sight or after sight is undated.

Where a note is signed and endorsed with a blank space for the rate of interest in an existing clause providing for interest, any person in possession of the note has *prima facie* authority to fill in any rate of interest, but if the note when signed and endorsed had no clause providing for interest, the addition of such a clause is an alteration not contemplated when the note was made and endorsed and avoids the note: *British Columbia* v. *Ellis*, 1897, 6 B. C. R. 82; cf. *Burton* v. *Goffin*, 1897, 5 B. C. R. 454.

A bill is drawn payable to —— or order. Any holder for value may write his own name in the blank and sue on the bill: *Crutchly* v. *Mann*, 1814, 5 Taunt. 529; *Mutual Safety Ins. Co.* v. *Porter*, 1851, 7 N. B. R. 230; cf. *Chamberlain* v. *Young*, [1893] 2 Q. B. 206, where it was held that a bill made payable to "—— order," and issued by the drawer and endorsed by him without filling up the blank, was perfect, "—— order" being construed to mean "my order," i.e., to the order of the drawer.

32. In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given: Provided that if any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

2. Reasonable time within the meaning of this section is a question of fact. 53 Vict. ch. 33, sec. 20. Eng. sec. 20. N. I. L. sec. 14.

This section is supplementary to sec. 31. "Such instrument" in sec. 32 refers to an instrument which has been delivered in an incomplete state, i.e., a simple signature on a blank paper delivered by the signer in order that it may be converted into a bill, or a bill delivered as a bill but wanting in a material particular (sec. 31.)

It is proposed, firstly, to discuss the cases where a signature or incomplete document has been so delivered (these

being the only cases to which secs. 31 and 32 apply), and secondly, to discuss the cases where there has come into the hands of an innocent holder a document in the form of a bill but which left the hands of the signer in an incomplete state without any effective delivery by him.

1. *Strictly in accordance with the authority given.*—If the bill is signed and delivered in blank and it is afterwards filled up within a reasonable time and strictly in accordance with the authority given, the holder need not shew that he comes within the proviso, and the signer is estopped from saying that the bill is other than, in its complete state, it purports to be. He cannot, e.g., shew that his name as endorser was put on a bill payable to the order of a third person before the payee had endorsed.[2] The delivery of the incomplete instrument authorises the various blanks to be filled up in any order, and the bill may be enforced by a holder who knew all the circumstances of the case, and even though he became a party to the document while it was still incomplete: *Gienie* v. *Smith*, [1908] 1 K. B. 263, C. A., at p. 267 ff.

A person who signs and delivers a blank paper in order that it may be converted into a bill upon the promise of the person accommodated, not a party to the instrument, that the latter will provide funds to meet the bill, is liable for the amount of the bill into which the paper is converted in accordance with the authority given to the holder in whose presence the conversion or filling in takes place, and *a fortiori* to a subsequent holder in due course: *Bacon* v. *Décarie*, 1908, Q. R. 34 S. C. 103.

Negotiated after completion to a holder in due course.—There seem to be cases which would arise fairly often in practice which would not be within the proviso, and where the first part of sec. 32 would take effect. The proviso can never operate in favour of a person who knows the acceptance of the bill to have been in blank. So where the plaintiff has inserted his own name as payee he will probably have to shew that this was done within the authority given by the defendant. See *Herdman* v. *Wheeler*, [1902] 1 K. B. at p. 37, where it is said that the rule just stated is in accordance with the cases decided before the passing of the Act,

[2] The defendant sought to bring himself within the case of *Jenkins* v. *Coomber*, [1898] 2 Q. B. 168. See however, sec. 131, and the cases of *Robinson* v. *Mann*, 31 S. C. R. 484, and *McDonough* v. *Cook*, 1909, 19 O. L. R. 267, 273-4.

with one possible, but not clear, exception. In the United States, however, the adoption of the Negotiable Instruments Law, sec. 14, has effected a change in the law. Street, Foundations of Legal Liability, 1906, II., 516.

A "holder in due course" is a holder (sec. 2) who has taken a bill, complete and regular on the face of it, under the conditions mentioned in sec. 56. If the bill is not complete and regular on its face, the holder has notice of the imperfection and can be in no better position than the person who first took the bill in blank.

If, however, the signature or incomplete instrument which has been delivered within the meaning of sec. 31, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands although it had not been filled up within a reasonable time or in accordance with the authority given.

As to "reasonable time," cf. secs. 77, 86, 166, 181 and 182, where this expression is used.

"Negotiated" in the proviso to the section means transferred by one holder to another (cf. sec. 60). A delivery of a bill to a payee for value is the issue of the bill (cf. sec. 2) and not its negotiation. B., intending to borrow £15 from A., signs a blank stamped paper, and authorises A. to fill it up as a note for £15 payable to A. A., instead of so doing, fills up the document as a note for £30 payable to C., and then hands it to C., who takes it in good faith and for value. Held, that, even if C. is a holder in due course,[3] the delivery of the note to him is not a negotiation of the instrument, and therefore he cannot recover, the note not having been filled up by A. in accordance with B.'s authority. *Herdman* v. *Wheeler*, [1902] 1 K. B. 361.

"Completion" in the section refers to completing the form of the bill or supplying the wanting "material particular." It does not include delivery, as in secs. 39 and 178, where a bill or note is said to be inchoate and incomplete until delivery (*ibid.*, p. 371).

Herdman v. *Wheeler* was decided solely with reference to the provisions of the statute and was distinguished on this ground by the English Court of Appeal. A. (the defendant) signed his name on a blank stamped piece of paper

[3] Although it was not decided in this case that the original payee may be a holder in due course, it has been so decided in other cases. See, *e.g.*, *McDonough* v. *Cook*, 1909, 19 O. L. R. 267, 271, 273.

and entrusted the paper to X. with authority to fill it up as a note for £250 payable to B. (the plaintiff) and deliver it to B. as security for an advance to be made by B. X. fraudulently filled up the paper as a note for £1000 and obtained by means of it an advance of that amount from B., who had no notice of the fraud. The proviso to sec. 32 was inapplicable for the reasons stated in *Herdman* v. *Wheeler*, *supra*,[4] but it was held in *Lloyd's Bank* v. *Cooke* that the principle of *Brocklesby* v. *Temperance Permanent Building Society*,[5] is applicable also to negotiable instruments, and the common law doctrine of estoppel is not made inapplicable by the Bills of Exchange Act, and therefore A. was estopped from denying the validity of the note as between himself and B. and was liable for the full amount. *Lloyd's Bank* v. *Cooke*, [1907] 1 K. B. 794.

In other words, if a person signs an incomplete document and authorises another person to complete it as a negotiable instrument and use it no matter to what limitation the authority may be subject, the signer is liable on the completed instrument to a holder in due course and cannot as against such holder set up fraud or abuse of authority.

Examples of Application of Proviso.—The defendant signed, as maker, a printed form of promissory note, and handed it to A. by whom it was filled up for $55. The plaintiffs became endorsees for value without notice. Defendant held liable though the note may have been fraudulently or improperly filled up or endorsed: *McInnes* v. *Milton*, 1870, 30 U. C. R. 489; cf. *Garrard* v. *Lewis*, 1882, 10 Q. B. D. 30,

Where the payee of a note endorsed it in November for the accommodation of the maker, leaving the date and sum blank, and the blanks were filled up in February by the maker, the date inserted being a day in January, it was held that the endorsee could recover against the payee. *Sanford* v. *Ross*, 1841, 6 O. S. 104.

An endorser placed his name upon a note without maker's name or sum or payee's name, and the maker's name was afterwards signed by another person without authority, and the note negotiated. The endorsee must shew that he is a

[4] If B. had negotiated the note after completion to C., a holder in due course, then C. could have recovered by virtue of the proviso.

[5] [1895] A. C. 173: a case of securities fraudulently pledged by an agent for an amount larger than the principal had authorized.

bona fide holder for value. *Hanscombe* v. *Cotton*, 1857, 15 U. C. R. 42; cf. *Rossin* v. *McCarty*, 1850, 7 U. C. R. 100.

Revocation of Authority by Death.—An instrument which is wanting in some one or more of the requisites of a complete bill is in effect a transferable authority to create a bill, and while incomplete is subject to the ordinary rules of law relating to authorities, e.g., an authority coupled with an interest is not revoked by the death of donor or donee, while an authority not coupled with an interest is revoked by the donor's death. See Chalmers, pp. 54, 56, citing the following illustrations:

1. B., who is indebted to C., gives him a blank acceptance for £100. C. dies. If C.'s administrator fills up the paper as a bill payable to drawer's order, and inserts his own name as drawer, he can enforce payment thereof against the acceptor. *Scard* v. *Jackson*, 1875, 34 L. T. N. S. 65.

2. B., who is indebted to C., gives him a blank acceptance for £100, and then dies. C. may fill in his own name as drawer and payee after B.'s death, and recover the amount from B.'s estate. *Carter* v. *White*, 1882, 20 Ch. D. 225, affirmed, 1883, 25 Ch. D. 666, C. A., where it was held that a surety for the acceptor, not party to the bill, was not discharged.

3. B., having authority to do so, gives a blank acceptance for £100 in the name of the firm. It is filled up after B.'s death. The surviving partners are liable. *Usher* v. *Dauncey*, 1814, 4 Camp. 97.

4. B. gives C. a blank acceptance to accommodate him, and without receiving value. After B.'s death it is filled up and discounted with D., who sees it filled up. D. cannot recover the amount from B.'s estate. *Hatch* v. *Searles*, 1854, 2 Sm. & G. 147, approved in *France* v. *Clark*, 1884, 26 Ch. D. at p. 262.

Nature of Holder's Right to Complete Bill.—The editors of the Ruling Cases suggest that the expression in the section "*prima facie* authority" hardly expresses the extent of the power of the holder of an incomplete instrument. The power to complete the bill, according to Cotton, L.J., in *Carter* v. *White*, *supra*, is not merely that of an agent, but arises from a contract that the person to whom the bill is given or any one authorised by him should be at liberty to fill it up. That contract is not put an end to by the death of the acceptor. 4 R. C. at p. 645.

But, as Ewart points out, in the cases where the signer is held liable on an instrument completed without authority or in excess of authority, *ex hypothesi* the contract is not that of the signer, and it is not made by any one having authority to make it for him. Upon what principle then can he be liable? In one way only as Ewart sees it and that is by estoppel—by estopping him from denying that the contract is his. Estoppel by Misrepresentation, 1900, 444-5.

II. *Instrument with Blank but not Delivered.*—The provisions of secs. 31 and 32 in favour of the holder are operative only upon the hypothesis that the incomplete document has been delivered by the signer in order that it may be converted into a bill.

Although therefore a person who issues a bill leaving a blank in a material part of it is estopped, as between himself and a *bona fide* holder for value to whom it has passed with the blank filled up, from disputing the authority so to fill it up, there is not estoppel or presumption of authority in the case of a bill which has not been issued—that is to say delivered with the intention that it should operate as a bill—by the person charged upon it. *Baxendale* v. *Bennett*, 1878, 3 Q. B. D. 525, 4 R. C. 637.[6]

Delivery is defined by sec. 2 as transfer of possession, actual or constructive, from one person to another. By sec. 39 every contract on a bill, whether it is the drawer's, the acceptor's or an endorser's is incomplete and revocable until delivery of the instrument in order to give effect thereto.

The doctrine of sec. 40 (by which, when a bill is in the hands of a holder in due course, a valid delivery by all parties prior to him, so as to make them liable to him, is conclusively presumed), is inapplicable to a document which, when it leaves the possession of the signer, is wanting in material particulars. The doctrine which in England and in Canada has been applied in the decided cases to such incomplete document is expressly provided for in sec. 15 of the Negotiable Instruments Law as follows: "Where an incomplete instrument has not been delivered it will not, if completed

[6] Ewart apparently does not admit this exception to the application of the principle of estoppel, although the exception appears to be clearly established by the cases to be referred to. See Estoppel by Misrepresentation, 1900, pp. 438-449. At page 440 he disposes somewhat summarily of a significant quotation from *Baxendale* v. *Bennett*, in which Brett, C.J., states the principle applicable to the signing of a blank acceptance.

and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery." By this section even the innocent holder is not protected if it is shewn that the incomplete instrument was never in fact delivered. The instrument is then treated, in effect, as a forgery. Street, Foundations of Legal Liability, II., 517; cf. *Caulkins* v. *Whisler*, 1870, 29 Iowa 495, 1 Ames, Cases B. & N. 580, 2 ibid. 865. The defence of want of delivery in such case is a real defence available against the whole world, not merely a personal defence which cannot be set up against a holder in due course.

A. wrote his name as acceptor across a document in the form of a bill of exchange addressed to himself and payable to drawer's order but with a blank for the name of the drawer. The document was stolen from an unlocked drawer of A.'s desk and came into the possession of B. who, without authority from A., filled in his own name as drawer and endorsed it. In its complete state the document was negotiated to D., who took in good faith and for value. Held, that D. was not entitled to recover against A. *Baxendale* v. *Bennett*, 1878, 3 Q. B. D. 525. 4 R. C. 637.

The sufficient unassailable ground for the decision mainly relied upon by Brett, C.J., in the Court of Appeal was the fact that A. never issued the acceptance and never authorised the bill to be filled up with a drawer's name, so that he could not be sued thereon. He was under no legal duty so that it was unnecessary to enquire whether he would have been negligent if there had been a duty. Bramwell, L.J., assumed that A. had been negligent, but considered his negligence not to be the proximate or effective cause of the fraud; he laid stress on a distinction between the cases cited and that before the Court; in them the instrument had been parted with voluntarily, but in the case before the Court the bill had been obtained by the commission of a crime. See T. Beven in 23 L. Q. R. at p. 396 (Oct. 1907). This distinction is clearly not the true ground of the decision in view of the case of *Smith* v. *Prosser*, *infra*.

A. (the defendant) being about to leave South Africa for England signed two lithographed forms of promissory note with blanks for the date, sum payable, payee, etc., and handed them to his agent X., telling him to keep them for him and, if he (A.) should send instructions by telegram or

letter, then to fill up the documents and raise money upon them for the purpose of making certain payments which A. might have to meet in South Africa while he was away. No instructions to use the documents were even given, but, in A.'s absence, X. fraudulently filled up the documents as promissory notes payable to B. (the plaintiff). B. discounted them in good faith and X. misappropriated the proceeds. In an action on the notes in England (the notes being stamped as foreign bills for the purpose of suit) it was held that, as A. had entrusted the blank signed forms to X. as custodian only and not with the intention that X. should issue them as negotiable instruments, A. was not estopped from denying that he was liable. *Smith* v. *Prosser*, [1907] 2 K. B. 735 C. A.

B. being the payee of the notes, there was no negotiation to him after completion, and the case, therefore, was not within the proviso to sec. 32. Moreover, B. had notice that X. was acting under a power of attorney and ought, perhaps, to have made enquiries. There was also some question as to the validity of the notes because they had not been stamped at the time of signature. All the members of the Court of Appeal who heard the case put their decision, however, on the broad ground that the documents had never been delivered by the signer with the intention that they might be converted into complete notes, and that delivery with that intention was essential to estoppel whether under the act or at common law.

Smith v. *Prosser* shews that the distinction made by Bramwell, L.J., in *Baxendale* v. *Bennett* is not valid in this connection. The fact that the signer voluntarily parted with possession of the documents does not preclude him from setting up the want of delivery.

Smith v. *Prosser* was applied in Ontario under the following circumstances. A. (the plaintiff) signed a lithographed form of note partially filled up in handwriting. The document was payable to A.'s order and was endorsed by him, but it was incomplete at least to the extent that no sum payable was mentioned in the body of the note, although the amount may have been written in figures in the corner of the form. No place of payment was mentioned although the form contained a space for this purpose. This document and a signed application for insurance on A.'s life were left by A. in the possession of B., an agent for soliciting life insur-

ance, upon the understanding that if and when A. passed the insurance company's medical examination the note was to be good or was to be paid by A. Soon afterwards A. decided not to proceed with the application, and he notified the company and B. of his decision but omitted to get from B. the form of note which he had signed. B. fraudulently filled it up as a note, inserted as the place of payment A.'s own bank (the defendant) and discounted the completed document with C., a holder in due course. C. presented the note at maturity to the defendant bank, which, without instructions from A., paid the amount out of A.'s funds on deposit. Held, that A. was entitled to recover notwithstanding that the defendant bank was the transferee of the note from a holder in due course. *Hubbert* v. *Home Bank*, 1910, 20 O. L. R. 531 (judgment affirmed by Divisional Court. Leave to appeal refused by the C. A.)

It is to be noted that in *Hubbert* v. *Home Bank* not only did the signer voluntarily part with possession of the document, as in *Smith* v. *Prosser*. He did more. At the time he parted with the possession he gave instructions which would have justified his agent in completing and using the document in a certain event which, however, never happened, whereas in *Smith* v. *Prosser* the agent had no right in any event at all to complete and use the documents until and unless he should receive new and independent instructions to that effect from the signer.

In conclusion, the later case of *Ray* v. *Willson*, 1910, 1 O. W. N. 1005, 16 O. W. R. 578, should be referred to. There, however, the Court found as a fact that the plaintiffs had such grounds for suspicion that they were not holders in good faith. The case was, however, decided on grounds similar to those which prevailed in *Smith* v. *Prosser* and *Hubbert* v. *Home Bank*. In *Ray* v. *Willson* an appeal to the Court of Appeal has been argued and is now standing for judgment.

JOHN D. FALCONBRIDGE.

Toronto, January, 1911.

CANADIANS AND THE PRIVY COUNCIL.

After the establishment in 1875 of the Canadian Supreme Court the Judicial Committee of the Privy Council prescribed with great clearness the functions of the latter body towards the new Canadian Court. Thus we read: "Before the constitution of the Supreme Court of Canada there was a right to appeal from the Courts then in existence, where the value of the matter in controversy was beyond £500, but that does not apply to the Supreme Court. The language of the legislature of the Dominion is: "The judgment of the Supreme Court shall in all cases be final and conclusive, saving any right which Her Majesty may be graciously pleased to exercise by virtue of her royal prerogative," and their Lordships are not prepared to advise Her Majesty to exercise her prerogative by admitting an appeal to Her Majesty in Council from the Supreme Court of the Dominion save, where the case is of gravity involving matters of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of very substantial character." (*Prince* v. *Gagnon* 1882, 8 A. C. 103.)

These principles were uniformly acted upon, and as late as 1903 Lord Davey, delivering the judgment of the board in *Clergue* v. *Murray* (72 L. J. P. C. 99), quoted with approval the above language, and thought it necessary to utter this warning and reprimand to Canadian counsel: "Their Lordships think that Canadian counsel ought to consider these principles before bringing a case like the present before them. It would be nothing less than a miscarriage of justice if their Lordships were to impose on the respondents (the defendants in the action) a fourth hearing of the case with all the expenses attendant upon an appeal to His Majesty in Council, after there have been three decisions in the Canadian courts, the final decision being that of the Supreme Court of the Dominion, which is entitled to every confidence on the part of the Canadian people." One would take these decisions to be a pretty emphatic statement from their Lordships as to the extent to which Canadians might expect Downing Street intervention in their every day litigation. In other words, that Canada had a

Supreme Court, and Downing Street graciously proposed to take cognizance of that fact.

Observe the transformation in 1910, when a plaintiff defeated in three Canadian Courts, the last one being the Supreme Court of Canada, is permitted an appeal, and triumphantly obtains in London a reversal of all three Canadian decisions, (*Cumberland Railway and Coal Co.* v. *Saint John Pilot Commissioners,* Canadian Reports (1910), A. C. 31). The Board of 1903 scolds Canadian counsel for even seeking its intervention under such circumstances, and says that Privy Council interference would be "nothing less than a miscarriage of justice," and the Canadian counsel who had the temerity to make the application for leave to appeal were told to go away and consult the jurisprudence which (it is said), guided the Board in such matters. The Board, in 1910, not only entertains such an application, but reverses all three Canadian courts. Again, in 1904, we find a Board presided over by Lord Macnaghten, refusing leave to appeal from the High Court of Australia in a case where the question was: Did the plaintiff, who was alleged to have been of unsound mind, understand what he was doing when he signed a certain power of attorney? The trial Judge found that he did and dismissed the plaintiff's action. The High Court of Australia found that he did not, and reversed the decision. The plaintiff sought leave to appeal to the Privy Council and Lord Macnaghten says: "Now the petitioners, as their Lordships understand, do not propose to contest the finding of the High Court on the question of fact, nor indeed would their Lordships be disposed to advise His Majesty to admit an appeal on such a question," and leave to appeal was refused (*Daily Telegraph Newspaper Co.* v. *McLaughlin* (1904), 73 L. J. P. C. 95), and Lord Macnaghten says of the Australian tribunal: "The High Court occupies a position of great dignity and supreme authority in the Commonwealth," and on this occasion he extended the compliment to our Supreme Court of Canada by saying of it that it was "an equally august and independent tribunal." This Board consisted of Lord Macnaghten, Lord Davey, Lord Robertson, Lord Lindley and Sir Arthur Wilson. But in 1910, in a case in which there "was a mass of conflicting testimony and everything depended upon whose version of the facts and of the verbal agreement between the parties was to be accepted," a Board presided over by Lord Mac-

naghten permitted an appeal from the Supreme Court of Canada, which had affirmed the judgment of the trial Judge and reversed the decisions of the two Canadian courts: (*Gordon* v. *Horne*. decided by the Privy Council on 29th July, 1910, but not yet reported). Some years previously the Board had dealt with the question of interfering with the findings of fact of trial Judges in this way. "This Board has no opportunity of seeing the witnesses, of considering in what respect credence should be given to one class rather than the other from the mode in which their evidence has been given; and it would have to perform a duty of a most painful character if it were not merely to reverse the decision of the Judge below with reference to the findings that he has come to adverse to the appellant, but had in such a state of circumstances to do that which would be a necessary corollary from such a step, viz., to give a deliberate judgment in favour of the respondents, without the same means of ascertaining the real truth as was possessed by the Judge of the Court below." (*The Princess Alice and The Alice*, 38 L. J. Adm. 5.)

Amid all this prattle of words one wonders where we are at, to use a colloquialism, perhaps unfamiliar to their Lordships—with our Supreme Court *quoad* the Privy Council. Their Lordships will even review and reverse a unanimous decision of the Supreme Court of Canada directing a new trial. (*Blue, et al.* v. *Red Mountain Railway Co.*, 39 S. C. R. 390 (1909), 78 L. J. P. C. 107.)

The conclusion forced upon the Canadian practitioner is that the obtaining or being refused leave to appeal is a pure fluke. If an application be made, leave is as likely to be granted as refused, and that, notwithstanding Lord Davey's strong language in 1903, no principles whatever, or at least no considerations such as he describes, now govern the Board in the granting or refusing of leave to appeal from the Supreme Court of Canada. It is apparent that the present day tendency of the Privy Council is to make any and all judgments of the Supreme Court of Canada upon any and all matters reviewable in London, and that the Supreme Court is now merely one of several appellate tribunals through which the unfortunate Canadian suitor must pass ere he can reach that Court which alone is clothed with the power to finally determine Canadian litigation—and that Court sits in England.

Had the policy of the Judicial Committee, as originally enunciated, been adhered to, even those who deplore and are ashamed of a condition of things whereby Canadian litigation must go to Downing Street for final determination would feel less abasement. The modified censorship which the Privy Council of former days announced, it proposed to exercise over our Supreme Court (unnecessary as it is) would perhaps have done no harm and might have pleased those who think the integrity of the Empire depends upon London having the power to settle our law suits for us. But when the Judicial Committee abuses that concession, or perhaps one should say "submission" of the Canadian people, into an unqualified license, to decide for us questions of fact (*Gordon* v. *Horne, supra*); questions of new trial (*Blue et al* v. *Red Mountain, supra*); questions as to what we mean by the statutes we enact (*Cumberland & Co.* v. *St. John & Co., supra*), it is time for Canadians to pause and take stock of their position as they probably will when their politicians get tired of shouting "loyalty," "Imperialism" and "navy building," at one another without any adequate comprehension of what exactly any of the three terms mean or imply or involve on Canada's part. Just at present a Canadian's loyalty seems to be measured by the number of battleships he wishes, or says he wishes, to have Canada build.

To some extent perhaps this change of attitude on the part of the London tribunal towards the Canadian tribunal may be accounted for by the fact that Canada has no voice in the appointment of this Court whither Canadian litigation must go for final determination, nor has it any adequate representation on the Board. Our status as Colonials is brought home to us very forcibly. We are conceded enough intelligence to make our own laws, but not enough to make the tribunal which is finally to interpret them. The manner of composing this Board and the mutations to which its personnel is subject may have something to do with the fluctuations observable in its treatment of Supreme Court judgments. Thus we observe that the Board which in 1903 viewed with indignation the injustice of a Canadian suitor victorious in all the tribunals of his own country being hailed to London for a fourth hearing, consisted of Lord Davey, Lord James of Hereford, Lord Robertson and Sir Arthur Wilson, while that which in 1910 viewed the same state of facts with perfect composure and reversed the de-

cisions of all three Canadian Courts without blinking an eyelash, consisted of Lord Macnaghten, Lord Atkinson, Lord Shaw and Lord Mersey. We quite understand that Colonials, and things Colonial, are differently understood and appreciated by different Englishmen. We do not expect the same appreciation or recognition in London as the inhabitants of the southern half of this continent who are not Colonials receive there. We may squirm a bit when we read of one English gentleman extolling another on having "completely altered the tendency of the decisions of the Supreme Court," as Mr. Haldane eulogised Lord Watson (*Judicial Review*, 1899, p. 279), and we may wonder why an English peer should be so all powerful in our judicial affairs. It may not be pleasant to hear from Mr. Chamberlain, as we did at the Colonial Conference of 1897, that if we want a Supreme Court on a par with that of the United States, we must look to England for it. To Mr. Chamberlain this seemed quite natural. The United States are a nation. We are colonists. It is very doubtful if Americans claim for their Bench and Bar any superiority over Canadians though they may wonder why we go to London to ascertain whether an action should be retried or what the statutes we enact mean or which witness at a trial ought to be believed. But on the whole, we have been taught our catechism, perhaps as thoroughly as the English peasantry, and are content with that station in life unto which it has pleased God to call us. Mr. Chamberlain was too candid to go further than to say that the Privy Council was the "nearest approach, the closest analogy to the Supreme Court of the United States," to which we Canadian colonists could aspire. He was, no doubt, oppressed with the fact that the inhabitants south of the boundary line, not only make their own laws, but appoint the tribunals which are to interpret them.

Nothing but the incubus of this perpetual supervision from Downing Street has prevented the Supreme Court from being held in the same esteem by the Canadian people as is the Supreme Court of the United States by the citizens of that country. How could it by any possibility rise to an equal greatness when the public hears from London that it erred in thinking an action ought to be retried as in *Blue. et al.* v. *Red Mountain, supra;* that it failed to correctly apprehend the meaning of statutes enacted here, as in

Cumberland & Co. v. *Saint John Pilot Co., supra*; that it formed a wrong opinion as to the credence to be given to witnesses at a trial, as in *Gordon* v. *Horne, supra*?

I hope at a future date to be able to furnish some statistics as to what it costs the Canadian suitor to cross the water and have this fourth hearing in London. It seems to me that four hearings of such causes as have lately been entertained by the Judicial Committee are a menace to the peace, welfare and good government of this "Colony." It is in the interest of the moneyed classes and inimical to the masses. Necessity does not demand it, nor does "loyalty" require it. Outside of corporations and rich people how many Canadians are able to afford a contest as to what our statutes may mean; as to how facts should be decided; or as to whether a new trial should be directed, if they are to be exposed to four hearings, the last of them on the other side of the Atlantic? And I might add, why in the name of common sense should they be exposed to this risk? Will the Empire otherwise crumble?

W. S. DEACON.

Vancouver, B.C.

ANNUAL ADDRESS OF PRESIDENT OF THE ONTARIO BAR ASSOCIATION.

Allow me to thank you for the high and unexpected honour you conferred on me in electing me to the presidency of the Ontario Bar Association at a time when I was absent from the province. I trust our present meeting will be a useful and interesting one to the members who have been able to attend.

I should explain why the Ontario Bar Association has found it necessary to call two general meetings in the same year, one in April last and the present one. An annual meeting should have been held last year, but owing to several causes, the annual general meeting could not be held until the month of April this year. There was then held in the city of Toronto a general meeting, at which several important and thoughtful papers were read, and short discussions held on the themes presented This was followed by a successful banquet at the King Edward Hotel, presided over by the president, F. E. Hodgins, K.C., at which eloquent and learned speeches were made by different United States and Canadian lawyers. On consideration it was thought best by the council of the association to hold another annual general meeting at the end of this calendar year during the Christmas vacation, they believing it would be a time when the majority of the members thereof would have the most leisure to attend.

An invitation was sent to this association to attend the annual meeting last August of the American Bar Association at Chattanooga in Tennessee. For various reasons, the president or any of the vice-presidents could not attend, but F. M Field, K.C., of Cobourg, was good enough to represent this association at their banquet. I understand he had a very kind reception, and his speech was highly complimented by those present, and did us great credit. I think by some of the lawyers of Ontario, the objects of our association have perhaps been somewhat misunderstood. I will therefore here repeat them, as laid down in our constitution; its objects are, "to facilitate the administration of justice, to promote reform in the law and procedure, to assist in up-

holding the honour and dignity of the profession of the law, to bring about united action, to conserve its interests, to encourage interchange of ideas, and closer intercourse among members of the profession in Ontario, and to maintain friendly relations with the profession in other jurisdictions," a somewhat extensive programme.

It is with considerable diffidence, I venture to address you on some of the many subjects in connection with the practice of the law. So much has been written and so many addresses have been given from time to time concerning the various legal subjects we have to deal with, that I feel the ground has been so well covered that it would take an abler man than myself to bring before you many new ideas, which would be either instructive or amusing. I will, however, at the risk of repeating some of the matters which you have already heard, endeavour to give you a few practical thoughts on some of these subjects, which I have tried to put in a somewhat condensed form. During my considerably more than four decades of practice in the profession. I have seen many changes made in the pleadings and general practice of the law, and in fact, almost the whole system of legal procedure altered more than once. When I was admitted to the Bar and for several years after, the Common Law Procedure Act, 1856, introduced from England, was in force, which gave us an entirely new system of pleading and practice in the province of Ontario. This was followed some years after by the Judicature Act, under which we are now practising. However, I shall not attempt to give you the history of these various alterations, as you probably know them as well as I do, and they would not, therefore, interest you. It is well known that the Judicature Act has abolished many anomalies and simplified the practice and pleading.

We all know that our profession is a most exacting one and calls for a life of devoted service to it to become proficient in all or any of its numerous departments. The price of success is unremitting industry joined to ability. Many a lawyer could have made far more money with the same amount of brains and industry in some department of mercantile or manufacturing business than he can hope to do in practising law. When we see men on every side of us in other walks of life with less education and less industry, and in many cases with less ability, making large

fortunes, we are led to think that our profession is not properly remunerated, or we also should be able to make fortunes out of our practices. Contrary to the opinion of the general public, I am sure that the majority of the lawyers throughout Ontario, can barely make a decent living, considering their education, their tastes and their environment. Of course, there are a few, but only a few, in the large cities, who have been able to make fortunes out of law, but more often by taking up other fields of work. This naturally brings us to the question of the remuneration of the lawyer, commonly called his costs. In this respect the lawyers in this province have a real grievance, as it is many years ago (over fifty years) since the present tariff of costs in suits was issued. During that time the cost of living has been very materially increased, but there has been no corresponding increase to the lawyer in his bill of costs. No doubt, by the grace of the taxing officer, larger counsel fees are allowed in these days than formerly to the counsel engaged in heavy suits, but this only affects the few and does not help the ordinary practitioner. A new and increased tariff of costs should be given to the profession, but the tendency of most of the law reforms has been to take from the lawyer some of his fees, which naturally happens by the laws being made more simple and by the jurisdiction of the inferior Courts being enlarged. When the jurisdiction of the County Court was increased by the recent Law Reform Act, the tariff as to these cases was lowered to the County Court basis, thus compelling any saving there may be to come out of the former earnings of the lawyers. I think the former tariff should be restored in these cases. The tariff in Surrogate matters was issued nearly twenty years ago and has not since been increased. In this the highest fee allowed is $30 for drawing all papers for probates of will or administrations of estates in non-contentious cases, and this fee is only on estates of $20,000 and upwards. This means that if an estate should be worth a million dollars, and the schedules and papers to be drawn up should be very voluminous and involve a great deal of time and attention as well as legal skill yet the solicitor is only to receive $30, the same fee as if the estate were only $20,000. This seems to be a manifest injustice and there should be an increase made to solicitors in their Surrogate fees for estates over $20,000. In July, 1892, after this Surrogate tariff was

issued, the Succession Duty Act came into force, and schedules, affidavits, papers and information had to be given by the attorney of the deceased, to the Solicitor for the Treasury, for which there was no tariff until the Ontario Statutes of 1906, and then only in the following words, repeated in the Ontario Statutes of 1907 and 1909: "The Judges and registrars of the several Surrogate Courts and solicitors practising therein, shall be entitled to take for the performance of duties and services under this Act, similar fees to those payable to them for the like services under and by virtue of the Surrogate Courts Act and the Surrogate Rules." As the "duties" and "services" of the solicitors under the Succession Duty Acts are only partly similar to those performed by them under the Surrogate Acts and Surrogate Rules, and as the charges for these are included in a lump sum by the Surrogate tariff, there is a variety of opinion among the solicitors and taxing officers as to what this section really means. We should have a proper tariff for services under the Succession Duties Acts. Then we have no authorized or recognized tariff for the various matters covered by Conveyancing, as they have in England, where the remuneration for this branch of law is much higher and more in keeping with the status of the practitioner. This is a very important part of the work of most lawyers, and more especially of those outside the larger cities, and a suitable tariff should be given us in this branch of the law. At the present time there are very many joint stock companies being formed, both under the Dominion and Ontario Statutes, but there is no tariff to guide the solicitor in making his charges therefor. The same thing is true with regard to the various matters to be attended to in getting through private Acts of Parliament, whether in the Dominion or the Province. The consequence is in all the cases not provided for by a tariff, it is always a question with the practitioner what should be his charge for the work done. While on this question of costs, I may be expected to say a few words on what is called the question of "block" costs. By this is meant the system whereby a solicitor can make a bargain beforehand with his client as to what will be his charge for putting through any litigation or any other legal work, and which prevails mostly in the United States. This system is provided for in the 1909 Law Reform Act, part 3, but it is so surrounded with conditions that I understand the

legal profession have hardly made any use of it. At all events, it has not been long enough in force for us to know if it will be a benefit or not to the profession, or an improvement on the present system. In reply to the sneers frequently flung at the profession for charging large fees, some maintain that it is in the interest of the general public to have litigation fairly expensive, and to compel the losing party to pay the largest part of his opponent's costs, as this will cause many disputes to be settled rather than to be fought out in the courts, where large costs must be incurred. In the United States where litigation is comparatively cheap, people rush into law suits; the consequence is that in all the large cities of that country, the Court dockets are continually crowded, and important cases are often delayed for two or three years before they can be tried and disposed of. The result is, many cases are defended for time only, as the delay is sure.

Some years ago we had, for a considerable time in Ontario an Insolvency law in force, whereby under certain circumstances a creditor could force a debtor into compulsory liquidation, or by the same statute a debtor could make a voluntary assignment of his estate to an assignee, the assets to be distributed in both cases, subject to first claims, *pro rata*, amongst his creditors. The compulsory liquidation has been abolished for several years, but the debtor has still the privilege of making a voluntary assignment, the County Sheriff taking the place of the officer called the official assignee under the old Insolvency Acts. In those old days an honest debtor who had conducted his business according to the law could get a release from all his creditors by the consent of a certain majority proportion of his creditors in number, and also in value, through the County Judge, and in some cases he might get his release from his creditors from the same officer, even without this consent. In practice it was found after a trial of some years of the Insolvency Acts, that considerable abuses had crept in with regard to dishonest debtors taking advantage of their creditors by means of the provisions of the Acts, and the system of Official Assignees using up a large part of the estates, so that complaints of the operation of the law from the mercantile community and others interested induced the Government of the day to repeal the law entirely. I am of the opinion, however, that a proper

and well considered Insolvency law might, with advantage to both creditor and debtor, be passed by the proper Parliament, which would fairly distribute the debtor's assets amongst his creditors, and also give relief to the honest debtor by releasing him from debts he can never pay. The result of the present law is that we lose many enterprising citizens, while we ought to be able to keep at least the deserving ones in our midst, but now if the creditor refuses to release the debt, the debtor has to go to some other clime and begin anew his business career.

The law with regard to married women being subject to the influence of their husbands, as expounded in the recent well-known case of *Stuart* v. *Bank of Montreal*, seems to me to be far reaching, though the decision of this particular case may be right. A married woman has become greatly emancipated from the influence of her husband by legislation for some years past, and she is now in most respects as free as a *feme sole*. If, however, a married woman in every transaction in which her husband is concerned, has to be advised by a separate solicitor as to her interests, it will materially increase the costs of each transaction and will likely lead to some very peculiar situations. The law laid down in this case might be made to apply to any contract from which the husband is to derive any benefit. This seems to me to call for some legislative action to make it less expensive for the married woman to enter into such contracts, while safeguarding their interests.

The great strike on the Grand Trunk Railway, which took place last summer, and which did so much damage to business men generally, as well as to the employers and employees, affords a strong argument in favour of making the "Conciliation and Labour Act" in cases between masters and workmen more stringent. Why not make the decision of the Arbitration Board after their award has been given under the Act, to be final and binding on both parties, and furnish the necessary machinery for the carrying out of such decision by compulsory means? We need not go nearly so far in this direction as they have lately done in France after the great railway strike in that country, but it seems only fair, after both sides have chosen an arbitrator, and the two so chosen have chosen a third arbitrator, and the different sides have had a full hearing of their cases, and the matters in dispute have been considered by the three

arbitrators, that the decision come to by a majority of the three should be binding on both parties and made compulsory in the carrying out of the same. This mode of settling differences has been recognized by our Courts in many other cases for many years, and I think, generally speaking, has worked well in practice. If such a law had been passed and been capable of being enforced, what a boon it would have been to this country in the many strikes that have arisen during the last few years. These troubles or strikes of organized labour are liable to break out at any time, and we all ought to welcome some speedy means of settling same in the interests equally of the employers as well as of the employees.

The Law Reform Act, which was dicussed at a former meeting of the association, was placed on the Statute Book at the 1909 session of the Ontario Legislature, and parts two and three have come into force by proclamation, but part one, changing the composition of the appellate Courts, has not yet been brought into force. There has been much newspaper talk of the many appeals taken from judgments of the lower Courts, but the actual statistics shew that only a small proportion of the cases tried go to the Divisional Court, and still fewer to the higher Courts of Appeal. I believe that there is little real dissatisfaction with the constitution of the present Courts, and that in any event it is far better to have a permanent Court of Appeal rather than a changing one. Many think that it would be a good thing to abolish the appeals to the Privy Council in England, and that our Supreme Court, who have a first hand knowledge of our people, our laws, our customs and modes of carrying on business, ought to be more competent to decide all Canadian cases than the law Lords of the Privy Council, who are dependent for information in these matters on knowledge derived from second-hand sources, so to speak.

Fortunately so far, the question of female suffrage has not become a live question in this part of the King's dominions. I hope we shall never see the fair sex behaving so wildly in this country as they are doing in England. The smallness of the vote in favour of the candidates of woman suffrage in the Old Country in the election just finished, ought to convince the leaders of the movement, that they have not used the right tactics in carrying on their campaign. I think here, for some time to come, women ought

to be, and probably will be, content with the votes given to widows and single women by our statutes in municipal and school matters.

The elections just over in the British Isles on the question of the veto of the House of Lords ought to make us thankful that the same question in our Government has not reached an acute stage. A reform in the composition of the Senate of Canada, which dates back to Confederation in 1867, is needed, and has long been talked of, but nothing has been done towards it up to this time. This might more easily be dealt with at the present time, when the Commons and Senate are politically in accord, than at some future time when they might be opposed to each other.

So far as I can remember the relations between the Bar and the Bench have never been more cordial than they are at the present time. I believe the present Judges are a good deal more considerate in their conduct towards the counsel, jury, and witnesses engaged in the various cases that come before them, than some of their predecessors have been. As illustrations of what I have referred to, I remember at least two cases in which I was personally engaged with the late B. B. Osler, K.C., as leading counsel at the Hamilton Assizes, when the Judges prolonged the sittings without the consent of counsel, until long after midnight, in one case, until after two in the morning. In those days some of the Judges would refuse to adjourn even for lunch or dinner, but sat on the bench steadily from 9.30 a.m. until 6 p.m. I might say that those Judges have been dead for some years. If this was done at the present time, the counsel and all engaged in the case would think themselves very badly used.

There is no doubt that ours is a most noble profession, and withal an honest one, and one that is necessarily in the limelight all the time. There is no class of the community who are entrusted with as much of their clients' property as the legal profession. There have been dishonest men in the profession, but these are looked down upon by their brethren, and are the exceptions that prove the rule. From our profession, are drawn not only the Judges, who are, generally speaking, taken from the ablest men at the Bar, but it also furnishes the actual rulers of most, if not all, of the civilized countries of the world. I need only point to the Premiers of Great Britain and Canada, and to the leaders in many of her other colonies, and also to the Presi-

dent of the United States, and to many of the leading statesmen in other countries. Most of the greatest statesmen of Great Britain and Canada, and of the United States, as well as of other countries, have been either practising lawyers or trained in the legal profession. There are many prizes to which lawyers can look forward in the political arena, as well as in their own profession, and naturally this attracts the brightest minds in every civilized country. In our own country of Canada, we have had amongst our chief statesmen such lawyers as Sir John A. Macdonald, Sir John Thompson, Sir Oliver Mowat, Edward Blake and Sir Wilfrid Laurier and Mr. Borden, Sir James Whitney and Sir Allen Aylesworth, and others too numerous to mention. We, of the profession should, therefore, by example and precept, use our best endeavours to maintain high characters and shew such deeds as will keep up that high standard of excellence to which those before us have attained. As a profession in this country, we are lacking in a written code of ethics. The American Bar Association has adopted a code of ethics which several of the Bar Associations of the United States, such as New York, New Jersey, Pennsylvania, Illinois, Boston, etc., have followed without change. I would suggest that this is a question which our association should take up and endeavour to have adopted at an early date, i.e., a properly written code of legal ethics, suitable to the province of Ontario. We have had a select committee on this subject appointed from our members, which I hope will in the near future make a report on the subject, as they are quite competent to deal with such an important matter.

There are many other subjects which could be mentioned, but I have not time to take them up, and there are some eminent members of the profession who will read papers on some of these matters, which no doubt will be very interesting and instructive.

LEGAL REFORM.*

I have been asked to speak to you for a few minutes upon the subject of "Legal Reform." In the first place I desire to congratulate you upon the fact that there is comparatively little in this favoured land calling for reform. When one reads the reports of meetings of bodies akin to this in other lands and reads the periodical literature of the profession one comes to realise that we are not face to face with many problems that confront other countries.

There is no congestion of business in our Courts. Cases can be tried as soon as ready for trial. There are no arrears in any of our Courts, either trial or appellate. Appeals can be heard practically as soon as they are set down, and speaking generally there is no delay between hearing and judgment. That this is so in all our Courts from the Court of first instance to the Court of last resort, indicates that as a whole our system is well balanced and efficient. "Some Measure of Law Reform" has become a political phrase, used with the view of influencing votes, in many instances, by those with little knowledge of the real working of our Courts and when reduced from mere generality to the concrete it is often found to mean little more than a general recasting of the machinery of the Courts, and heretofore has not brought forth much real fruit. Speaking for myself, my short experience upon the Bench has not changed the view formed as the result of fairly active practice at the Bar, that a system that has been found to work well should not be radically changed, and that it would on the whole be better to endeavour to get rid of minor defects in the present system rather than to make any great change.

The administration of our criminal law, particularly in all cases of importance, leaves little to be desired. The limited right of review now permitted by the Code removes what was at one time a defect and substantial justice is now assured.

Yet the proceedings in Magistrates' Courts often miscarry. Technical errors, at one time, made it almost impossible to sustain any proceedings in the Magistrates' Courts. The magistrate was still surrounded by the necessity of

* Address by Hon. Mr. Justice Middleton, to the Ontario Bar Association at Toronto, on 29th December, 1910.

technical accuracy which survived from the old common law days. The power to amend and sustain convictions when guilt is clear and there is no real miscarriage is a great advance. Yet too many convictions are still quashed and I would submit that the law might well be amended so that in all cases in which a conviction cannot now be sustained by reason of some error not falling within the saving and curative sections of the Code the Court should be given power to order a new trial, so that the guilty may not escape by the error or even stupidity of a magistrate.

This, however, is a minor matter. I desire to place in the forefront of suggested reform the need of a change in the law with regard to Workmen's Compensation.

Common law, said to be "the last result of human wisdom acting upon human experience for the public benefit" and to be "founded on the charities of religion, in the philosophy of nature, in the truths of history and the experience of common life," has admittedly proved inadequate.

We have for long had a "Workmen's Compensation Act" in some respects modifying the common law and practically all countries where the common law prevails have some special legislation dealing with the subject. In some countries the legislation is far-reaching and radical, in others by no means drastic. The common law obligation of the master has been thus defined: "The common law implies a contract between a master and servant whereby the former undertakes through himself or his agents to use reasonable care to furnish and maintain suitable and safe places, machinery and appliances for the work to be done, to hire competent servants and to warn the servants of all dangers of the work known to him and not known to the servant; and the latter undertakes to assume the risk of injury arising from the dangers of the work which he knows or ought to know and the risk of injury caused by the negligence of all other servants in the common employment."

I will not say the law is unjust—it is the result of the searching of able and righteous men after justice. According to common law ideas it has always been the law even though that fact was only ascertained in 1837, when *Priestly* v. *Fowler* was decided. The main defect in the law is that negligence of the employee, the negligence of the fellow servant and the "voluntary assumption of risk," leave many a man disabled and with no right to recover—a burden upon

the community. In the event of his disablement or death the community must care for him and his family. The master has not been in fault in any way, and the common law relieves him. It is not in the public interest that the man and his family should be placed in this position.

I cannot discuss the matter in all its bearings in the short time at my disposal. The great concurrence of opinion among those who have thought upon the subject is that the risk of carelessness either of the man or his fellow-servant resulting in injury ought to be borne by the industry. The industry has to bear the risk of machinery proving defective and of machines being injured by careless workmen. Why should it not bear the risk of workmen being careless and injuring themselves and others. There must be a certain number of accidents in any industry—let the making of some reasonable compensation be a charge on the industry. Let the common law stand, if the master be negligent let him make compensation—give indemnity to the extent of the common law liability. In other cases let the industry bear as part of its cost, some fair sum, small enough to prevent any suspicion of the voluntary incurring of an injury, small enough to be no premium on carelessness, yet sufficient to prevent the man being a charge upon society. Society at large must pay as the cost of production will to some extent be increased, but the loss will fall where it should, upon the consumer of the article produced.

The problem as to how this can be borne by the master is not easy. The fairest way would be to levy an assessment on the factory. This would represent accident insurance and the funds so raised should be administered by a board which should adjust all claims. This would obviate the difficulty now arising from employee's accident insurance, when the company defends all actions in the master's name and the amount paid in premiums to a large extent is used in law costs expenses of the administration of the company and shareholders' profits. This will also enable the master to know the exact amount required to meet his liability as a factor of cost and prevent the ruin of the small manufacturer by an accident.

It might be right that the wage earner should contribute to this form of accident insurance and the public might well contribute, as they would be relieved to a large extent of the burden of the unfortunate and the expense of litigation

which is by no means inconsiderable. The working out of any scheme in detail must of necessity require great care, and full advantage should be taken of what has already been done in other lands. The report of a special committee of the New York Bar Association presented at the annual meeting this year, and the summary of the laws of Germany, Austria, France and England accompanying it, will be found of value, as will also the English government report of 1904 on the working of the English Act of 1897.

Akin to this question is a wider and more difficult one. Is our law with reference to contributory negligence reasonable and fair? This sounds like questioning the very foundation of our jurisprudence. You know that in civil law when there is an accident resulting from the negligence of both parties the loss is apportioned. The same law is administered by my brother Garrow when he deals with maritime cases. But in our Courts if both plaintiff and defendant are negligent there can be no recovery. (I am leaving out of sight cases of ultimate negligence). If sailing on the lake there is a collision as the result of the negligence of both parties and one vessel is injured and one escapes injury each has to bear its share of the total loss. If navigating the even more perilous highway an unfortunate by the joint negligence of himself and a motorman has a collision with a street car, the chances are that all the injury will be done to him and comparatively little to the car. Assume the fault to be equal, it seems unfair that he must bear all—yet such is our law. Is it certain that our law is as just as the civil law?

Another matter that I think calls for consideration is the speedy trial of serious criminal cases; cases that can only be heard before a High Court Judge. Minor offences can now be dealt with speedily by the County Judge, but an innocent man (or worse still a woman) may remain in gaol for several months before this case can be heard. While there should be no undue haste in the trial of these cases it is not in the public interest that there should be long delay.

The expert witness is always with us. His presence is most felt in accident cases and testamentary cases in which capacity is in issue. The evil of a witness who is in truth a paid advocate and who states not facts but opinion is manifest. He was upon my list as a possible subject for reform. In many of the States there is some attempt to reach the difficulty by legislation mostly along

the line of having a board of experts nominated, one or more of whom is to assist the Court by his evidence. Among medical men the evil is admitted but the remedy suggested is a medical assessor to sit with the Judge.

I have had the opportunity of reading Mr. Justice Riddell's paper read to the Medical Association and am convinced that he is right and any real remedy must come from within the medical body itself. Medical men should be taught the true office and function of a witness, and with regard to cases dealing with testamentary capacity should learn what the Courts have given as the standard of capacity and, accepting that, attempt to aid in the solution of the question before the Court rather than to confuse by giving evidence based upon some other than the accepted legal definition.

Then there is the question whether the right of appeal upon questions of fact should not be restricted.

Courts exist to ascertain and determine the rights of the parties, that is their primary purpose. This is answered by determining what the facts are and what the law applicable to the facts found is. The finding of fact is of importance to the parties and the parties only. The finding of law is of importance not only to the parties but also to the community as a whole. The Court declares what the law is and this binds the whole community and therefore it is of importance that the law should be rightly declared and there should be freedom of appeal. The finding of fact is confined in its operations to the parties and while it is of great importance that it should be right the importance is confined to the parties and the parties only. There is and can be no assurance that the finding of fact by an appellate Court will in any great number of cases be any nearer the truth than the finding of the Court of original jurisdiction. One appeal upon questions of fact ought to suffice. A second appeal seldom has any beneficial result and the expense becomes a factor of great importance. In the classification of appealable and non-appealable matters this seems to me to be a satisfactory line to draw.

With regard to procedure, I have few suggestions. I submit that the scope of originating notices might well be enlarged. At present they afford a satisfactory way of determining questions that arise in the administration of

estates. Many other questions could readily be dealt with in a summary way.

Then there should be some summary way of determining questions arising upon titles without having the whole title quieted. The Vendors and Purchasers Act is not satisfactory as the order only binds as between the vendor and purchaser and does not determine the right as against any adverse claimant. The originating notice might well be made to apply to this.

A standard form of insurance pólicy for accident insurance and employees' fidelity insurance is urgently required. At present the policies are often so cumbered with provisos as to be as meaningless as an old time fire insurance policy. When any departure from a normal and fair policy is desired then departure should be made plainly evident to the insured.

A standard form of bond should be prescribed as necessary for all municipal and school treasurers and other similar officers. The bonds now given by surety companies are so conditioned as to prevent recovery in many instances.

The Insurance Act might well contain some similar provision as to the bonds to be given by the treasurers of all fraternal bodies, and all bonds by such treasurers and municipal officers should be filed in some central public office.

The sale of land under execution is now conducted in a manner well devised to produce the minimum amount. A fair advertisement stating the description of the property and the exact interest to be sold should be required. This might well be settled by the Master who might have the same discretion as to the kind of publication necessary as in sales in his office.

Tax sales also produce less than they ought as the uncertainty of a tax title is proverbial. Could not a measure be devised by which all preliminary steps should be proved before the municipal board whose finding should be final?

In a similar way would it not be well to require that all municipal debentures should be passed by that board, and when so vouched for should not be subject to attack in the hands of any *bona fide* holder.

And lastly, there is great need for the establishment of houses of refuge for the destitute, in the districts. There is provision for them in counties, but in the new country there is no haven for the destitute but the gaol. This is not as it should be, and when one finds old men and women

committed time and again as vagrants—the only offence being poverty—it seems to me there is something wrong. Why should not the districts assume some share of the burden?

These suggestions I make with much diffidence. They are suggestions only. Care is necessary if any of them are to be worked out. Probably you will see fit to consign them to the last resting place of so many presentments of the "Grand Inquest"—the pigeon-hole—or they may perchance only be destined for the waste paper basket.

THE HAGUE TRIBUNAL.*

Mr. President and Gentlemen of the Bar Association I feel a good deal of diffidence in coming before you on this occasion, and the more so because I cannot help recognizing that I am here as a substitute and a stop-gap for a much worthier man. We all lament the misfortune which prevents the place I am attempting to occupy to-day being filled by the man who was to have addressed you upon this subject, our good friend, Mr. Shepley. (Applause.) He is now laid up by a serious illness from which we are glad to think he is gradually recovering, and we especially lament the misfortune of his inability to be present, because it would be not merely a privilege but a very substantial advantage to this Association and to all of us if he could have addressed you upon the great subject with which he has lately been identified. I cannot hope to fill his place, and the diffidence which I feel in attempting to do so has been by an untoward accident in the phraseology which a good friend happened to use in writing to me the other day, considerably increased. He alluded in his letter to "the paper" which I was to read upon this occasion, and the word came to me with something of a mental shock because I have not any "paper," and I have nothing to present to you except a few words as they may occur to me upon this important subject. I do not apologize for the absence of the paper though I certainly regret the fact that it is not forthcoming. It is

*Address by Sir Allen Aylesworth before the Ontario Bar Association on 29th December, 1910.

due probably to the circumstance that time is now, as for the past 30 years or more it has been with me, a scarce commodity, and that patience to prepare such a document is also something that unfortunately I lack.

I might speak to you without impropriety, coming back as I do to the circle of my own personal friends, upon the part which in this recent great arbitration our good friend Mr. Shepley played. I assure you it was no unimportant part; it was a part which involved for him long and arduous labour, and which put upon his shoulders great personal responsibility. There was assigned to him at an early stage of the proceedings at the Hague this summer the duty of maintaining against whatever attacks might be levelled against it the whole body of the Canadian and Newfoundland legislation on the subject of the fisheries, and Mr. Shepley was necessarily detained until the last moment when the decision was announced and even for a day or two afterwards in connection with that work in regard to which it had been up to that time expected his services as counsel to address the Tribunal would be needed. But in the result the question of existing legislation was, to describe it briefly, "referred to the Master," instead of being adjudicated upon by the Tribunal itself as he had expected. But up to that time, from the beginning of the proceedings on the 1st of June until the award had been promulgated on the 7th of September, and afterwards for a few days in consultations in regard to it, Mr. Shepley's presence and his daily and hourly work was needed and was had to the great advantage of every other person connected with the case.

Without further preface of a personal character, I want upon this occasion to say to you a few words with reference to the nature of this dispute, and the disposition which has been made of it in regard especially to the aspect of International law.

International law, so far as we here in Ontario have any acquaintance with it, is a subject to which none of us, I suppose, have given any very special attention. In our relations to the Empire of which we form a part it has not to any very great extent up to the present stage of our history been necessary that the lawyers of Canada should practically concern themselves with the great problems of International law. There is very much, I may say, to be learned about it,

a great volume of literature which even our excellent library here at Osgoode Hall does not possess. During the years I have lived among you and served as a member of the library committee, there was more than one occasion when that defect in our library was brought to the attention of the committee, and pressed upon us for consideration, and while our library is very excellent and very complete in perhaps every other branch of law, there are but a few volumes upon this very important subject. Possibly that omission or defect may soon be remedied. I think it would certainly be to the advantage of all of us if it could be.

International law possesses this feature of difference from other branches of law that there has never been the same certainty about the principles which underlie it, or the rules by which the practice of it has been governed. There never has been any Court with the right to pronounce authoritatively upon what is International law, and the body of existing law in that branch of the science consists necessarily of the opinions of learned men who have written upon the subject. There are, of course, underlying principles, principles elaborated by the text writers who have discussed them, but principles which they themselves have had to formulate or to deduce from the conduct of nations. They have endeavoured to find in international compacts some principle which they might lay down as a guiding rule, which they might endeavour to support by reference to the provisions of treaties upon the different subjects which fell to be dealt with by the various independent nations. And so, from time to time different International writers have endeavoured to find if possible, some uniform principles, which underlay these different provisions, and so, deducing those principles, to treat them as established within the field of International law. But in the absence of any Court to decide with authority between the different theories of international writers, each new writer has simply had, as the basis for the views which he announced, the experience of the past and the theories of writers who had preceded him. Possibly a different condition of things will, to some extent, have been introduced by the establishment of the permanent Court of Arbitration at the Hague.

The constitution of that permanent body is of the simplest. Nearly all of the civilized nations of the world have entered into the convention amongst themselves to

establish this permanent Court at the Hague. Each of the nations signing the Convention has appointed to the permanent Court a given number of representatives, 3, 2, 4, 1, as the case may be, according to the importance of the nation represented, and in that way there is a permanent body of some 80 or 90 gentlemen who are held out by their respective countries in this way as men who are of standing and repute, men of learning who are prepared to give their services as International arbitrators, if any nations agreeing to arbitrate desire to have recourse to the permanent Court.

There is thus a permanent Court established, with a Bureau at the Hague, with a small staff of assistants and a magnificent Temple of Peace as a Court room for the sittings of International Tribunals is in course of erection under the munificence of the millionaire, Andrew Carnegie. This is in brief the constitution of the permanent Court.

When any two nations agree to refer to a Tribunal to be selected from the permanent Court any question of International difference, the body of the Tribunal is selected from among the members of the permanent Court. Accordingly when our dispute in regard to the fisheries was decided to be referred to the Hague Tribunal five men were selected from the permanent Court to constitute the International Tribunal which was to pass upon the questions submitted. The president of the Tribunal was one of the representatives of Austria-Hungary, a gentleman of learning, a professor or lecturer upon the subject of International law in the University of Vienna, and a member of the Upper House of the Austrian Parliament. Next in order of seniority was one of the representatives of the Netherlands, a gentleman who, himself, in his day was a practising lawyer of the Netherlands at the Hague, and who has been a member of the Government of the country and is at the present time one of the members of the Upper House of Parliament for the Netherlands. The third non-national member of the Tribunal was one of the representatives of the Argentine Republic, who had been Minister of Foreign Affairs for that country, and who is at the present time a practising lawyer of eminence in Buenos Ayres. Then the two national representatives were Mr. Justice Gray from the United States, who is a member of the United States Circuit Court of Appeals of the State of Delaware, and the Chief Justice of Canada, who was named as the British representative.

The questions to be submitted to these gentlemen were a matter of agreement between the United States and Great Britain. There was about the stating of them the very greatest practical difficulty. It was found in the result quite impossible to reach any common footing from which that question which concerned the right of Canada and Newfoundland to legislate in regard to the treaty coast should be stated. The two nations were so diametrically opposed to each other in the point of view, and the starting point from which they looked at this question, that nothing we could propose, though we tried our utmost to state the question fairly, could be found acceptable to the United States, and in nothing which they proposed, desiring, I am convinced equally with ourselves, to be perfectly fair in the statement of the question to be investigated, was there anything which we thought we could safely accept. From either their or our point of view in the great number of attempts which were made, there was always the feeling that there was a begging of the question. that there was underlying the idea expressed in the words used, a practical assumption of the contention of the party who was framing the question, and after prolonged honest effort, earnest effort for months to state something which could be accepted by the other side, finally we had to give up the attempt and adopt a device which I think is entirely new in the history of submissions to arbitration, either public or private. The suggestion was made that each side should state its own contention, and leave the Tribunal to determine between the two as to which was correct, or, if neither was wholly correct, what was the true interpretation of the Treaty as decided between the diverse statements. When it was decided to attempt a settling of the question for decision in that manner, it became something of very practical importance to know just how far one could safely go. We thought at the time that it would be of very great value to our side if we could get the opening speech to the Tribunal. The result of whatever experience I have had in the practice of the law makes me think that this is always important. Now, very many men, especially counsel accustomed to practising before juries, attach greater importance to the final word. I must say that I have not seen any reason in my later experience to depart from the rule which as the result of my earlier years I have formulated as my own guide of practice

that the advantage rests rather with a good opening than with a good closing. Of course, under our system here in Ontario the man who opens generally has the reply, and has the double advantage, but I need scarcely say that any such arrangement as that would be quite impossible in an International arbitration, and that it is therefore a question of the one side opening and the other side closing; and feeling that, I had for myself, from my earliest connection with this difficulty, after it had been determined that if possible it should proceed to arbitration, rather settled myself in my own mind to the effort of securing on our part the opening argument, and to that end I was quite willing to accept, if it were not made too heavy, the burden which might rest upon the affirmative of any of the questions which were to be propounded. With that view in mind, after the suggestion had been made that each side should state its own contention in respect to the right to legislate, I thought it would be a good thing, on our part, if we could assume the affirmative, and accordingly the question which was ultimately settled and propounded took the shape of assertion on the part of Great Britain, Canada and Newfoundland, that the Legislatures of these latter countries each possesses the right to pass laws for the regulation of the fisheries upon the Treaty coast so long as these laws are reasonable in their character. Much more is contained in the question, as one may see who takes the trouble to refer to it, but the effort in framing it was in brief what I have stated.

One of the consequences of the stating of the contention on our part in that shape was that the United States was content to deny, was content to rest upon practically the simple negation of our assertion, rather than the putting forward on their own part of any independent contention. And so in the result, while we were unable to agree on any formula of words, as if it was to be a stated case, and put that before the Tribunal, we went before that body, upon this very important branch of the enquiry, with a statement of our contention which we ourselves had framed, using our own choice of language, going just as far as we thought we safely could, and still trying as best we might be able to cover the whole ground which would secure for us that for which we were fighting. The other side practically adopted the same course, and repeated much the same

phraseology, and in the result contented themselves with the contention that what we were putting forward was not so, and leaving the burden upon us. The result has been, from our point of view, most satisfactory, because the Tribunal has adopted in its award the very phraseology which we had chosen and has affirmed in set terms exactly the thing which we had put forward as covering our case. (Applause.)

Now, I need not speak, of course, of the vast importance to us in Canada, and to a greater extent to our sister colonists in Newfoundland, of this result. A decision to the contrary would have been disastrous, and would have put us and Newfoundland into a humiliating and, I would almost say, a degrading, position. We would have been unable to enforce within our own territory a single Canadian or Newfoundland law in respect to the operation of these fisheries unless the Government in the States saw fit to assent, and unless their citizens engaged in the pursuit of their lawful avocation within our own territory were willing to submit themselves to the regulations which our Parliament had established. The result would have been that our Canadian or Newfoundland fishermen would have been bound by these regulations, would have been compelled to comply with them, and side by side, even within sight, even within speaking distance, it might be that another vessel of the United States would have been perfectly free from these regulations would have been perfectly at liberty, unless the men engaged upon the other vessel were willing to forbear, to have exulted over their immunity from regulations which their Canadian and Newfoundland fishermen were compelled to observe, and the condition of things upon the Treaty coast would simply have been that which Lord Salisbury described as a condition of anarchy. There would have been no law, as to these waters, binding upon a considerable part of the fishermen who resorted to them. It went without saying that the Government or Congress of the United States could not legislate in regard to these waters which were to them extra-territorial, and that their citizens, if not bound by our laws would be bound by no laws whatever. Yet that was literally the result of the position which upon this question had been assumed by the statesmen of the United States. To us that view certainly seemed an impossible one, and yet it was a most dangerous one. It was a view solemnly put forward by men of great learning and ability on the part

of the United States, supported by arguments of cogency and strength, a view difficult to deal with, a view full of danger which necessarily caused to everyone connected with the matter on our side very great anxiety.

The contention was first put forward some 60 years after the Treaty had been made. The treaty determining our rights and those of the fishermen of the United States had been entered into in October, 1818, and it was not until the Fortune Bay difficulty took place in 1878 that this contention came to be formulated and stated on the part of the United States. The Fortune Bay difficulty is one that no doubt the older ones amongst us here will remember as a contemporaneous event. Although occurring in Newfoundland, it was a matter which brought the two peoples of Great Britain and the United States into such direct collision that it was felt over the whole Anglo-Saxon world to be a difficulty of great seriousness, and another of the numerous difficulties which prior to that date had grown out of the Fisheries Treaty of 1818. The origin of it was simple enough—just the kind of incident that leads sometimes to war. Some of the fishermen of Newfoundland on a Sunday were by a local law restrained from carrying on their fishing operations, and while they were presumably going peaceably and religiously to church, they were compelled to see their competitive fishermen from the United States getting magnificent hauls of fish out of the bay before their eyes. That was more than human nature could stand, and whether or not, the number of fishes was miraculous, the indignation of the Newfoundlanders arose at the sight, and they fell upon the unoffending Americans, destroying their implements and releasing their catch. Representations, of course, were at once made of this outrage, and diplomatic correspondence for months ensued between the Governments of Great Britain and the United States, and in the result Great Britain paid handsome damages, and, of course, properly so, because, no matter how much the fishermen of the United States may have committed a breach of a local law, it was a first principle that private citizens of Newfoundland had no right to enforce these laws with a high hand and with their own strength, but should have gone about the matter in an entirely different shape. Accordingly the damages were paid and the incident was at an end so far as that was concerned. But in the diplomatic correspondence which

grew up in connection with the matter, the Secretary of State for the United States, at that time, Mr. W. M. Evarts, took up the position—I had almost said drifted into the position—I don't know that I should say that, because I do not doubt that he deliberately took up the position which since then has been maintained by the United States, namely, that their fishermen exercising their Treaty right, though within British waters, were not bound by the local laws of the British Colony, so long as the United States had had no part in the making of those laws, and had never assented to their righteousness. Great Britain maintained exactly the opposite contention, and the result of prolonged diplomatic correspondence between Lord Salisbury, then Foreign Secretary for Great Britain, and Mr. Evarts, was that each maintained with equal strength his own position in the matter, and it was impossible to reconcile the adverse views. From that time forward the matter slumbered. There was a very serious effort to settle it in 1888 when a treaty was negotiated which, however, never became ratified, as it was rejected by the Senate of the United States at that time. This Treaty having been signed in the month of February, 1888, and it being impossible to submit it to the Senate for some months, a *modus vivendi* to cover the interim period was arranged between the plenipotentiaries who had negotiated the Treaty. That *modus vivendi,* so far as Canada and the United States are concerned has been enforced from that day to this, neither party ever having formally accepted it, but each party going on for now nearly 23 years, acting under it, living up to it, getting along in friendly and neighbourly fashion by means of its provisions, just exactly as we, with our great neighbours to the south of us have lived in friendship and amity in regard to our armaments upon the Great Lakes for nearly one hundred years. We in Canada have had no difficulty. We have got along, as I say, for the last 23 years, and we are getting along to-day without any friction or any collision, and with us in Canada the United States had no quarrel. But things were not going so well in Newfoundland. It is to be borne in mind when looking at this whole difficulty that it is a good deal bigger question in Newfoundland than it is in Canada. It is of vital consequence to them. With them their fisheries are their largest, I might almost say, their sole source of revenue. Comparatively speaking the fisheries are of much

more importance to Newfoundland than the Canadian fisheries are to Canada, and so far as the portions of the coast which are assigned to the fishermen of the United States are concerned, there is much greater territory within Newfoundland than there is within Canada. So that from both points of view this difficulty with the United States was of very much greater practical consequence to Newfoundland than it was to Canada.

And Newfoundland, not being content with the substance of the arrangement of February, 1888, which we generally call the *modus vivendi*, and not accepting it, an effort was made a few years later to make a new Treaty. A result was reached in what is commonly called the Bond-Blaine Convention, which never was ratified and came to nothing. Ten years later, another arrangement was entered into between Sir Robert Bond on the part of Newfoundland, and Mr. Hay on the part of the United States, the Bond-Hay Convention, which equally has never been ratified and never has come into force. There was, therefore, no arrangement between Newfoundland and the United States from 1888, or, indeed, from the expiration of the Treaty of Washington in 1886, and things kept getting rather worse than better between the fishermen of the two countries, and collisions took place from time to time, and finally it came to be a matter of legislative reprisals. The United States would not admit the fish or the products of the sea caught by Newfoundland fishermen into the States except under terms of duty which were so high as to be practically prohibitive. Newfoundland fishermen were then thus cut off from practically their only market. They were unable to arrange any international agreement by which the incidence of these heavy duties could be lessened, and finally they gave up the effort. They resorted to tactics which can only be described by the words I have used, they sought to use what they considered their means of defence in the way of striking back at the United States, and they passed in the first place, an Act of their legislature, designed to prevent the fishermen of the United States from obtaining bait upon the Newfoundland coasts. The question of bait has always been a burning question. When the Treaty of 1818 was under negotiation, of course, the cod fisheries were the most important; the cod fisheries are to-day the fisheries of the greatest value. When a fisherman of our Maritime

Provinces, or of the New England coast, speaks of "fishing," he means catching cod; when he says "fish," he means cod; if he means anything else, he will say so. Cod is the staple in the fisheries on the banks of the open sea on all of the Newfoundland coast. It being the important and valuable thing it has always been a matter of the greatest consequence to the fishermen of the United States to obtain their bait, if they can, by purchase, instead of catching it themselves. They cannot afford to waste their time catching bait. They come a long distance, 400 or 500 miles from the shores of Massachusetts or Maine, and they cannot waste their time in catching bait when they should be occupied in the more valuable pursuit of the cod. and thus enabled to get away home as soon as possible with their cargo. Under the *modus vivendi*, we in Canada sell them bait freely, as freely as we would to anybody, and they could come into any of our ports to buy their bait and return to the fishing ground. But, of course, that wastes time in getting from the great bank south of Newfoundland to some Nova Scotia port to get their bait, so it would be of the utmost value to them if they could get their supply of bait near at hand from the Newfoundland fishermen. And, accordingly, as long ago as 1818, when the plenipotentiaries were discussing the terms of that international arrangement, the proposition was made by the representatives of the United States, and pressed by them to the utmost, that the Treaty should give them the liberty of getting their bait in Newfoundland. The British were firm in declining to consent to any such arrangement, and, adhering to their refusal, it was ultimately agreed to be silent upon the subject of bait. But the fact that so determined an effort had been made on the part of the United States to secure that privilege, that that effort had not been successful, and that the Treaty makes no provision for the obtaining of bait, of course, made the men of Newfoundland all the more resolute that the United States fishermen should obtain no bait in Newfoundland waters unless they fished for it and caught it themselves. Therefore, that question of bait has been for now 90 years a burning question as between Newfoundland and the fishermen of the United States. And when in 1905 Sir Robert Bond made up his mind to strike back at the United States with such weapons as were at hand, in answer to what he considered their un-

righteous refusal to admit the fish of Newfoundland except under such prohibitive duty, he naturally turned his mind at once to the subject of bait, and he passed a restrictive measure firmly prohibiting under severest penalties any citizen of Newfoundland selling bait to any foreign vessel, especially to the vessels of the United States, and at once difficulty arose. I need not say to you, we all know, how ingenious the men of the United States are, and it took the United States fisherman a very short time to circumvent Sir Robert Bond's law, and very promptly quit buying bait of the Newfoundland fishermen, and with equal promptness take the Newfoundland fisherman to be his hired man, and to engage that fisherman to catch bait for him, and he paid him by results, and Sir Robert Bond's prohibition of the sale of bait practically amounted to very little, and the Legislature of Newfoundland had to go to work again at the matter in the following session, when they passed a new statute by which they prohibited, under very heavy penalties, any citizen of Newfoundland engaging to work for any foreign fisherman or any fisherman of the United States; and things having got into that condition in 1906, and this matter being, as I have tried to describe, one of such living, vital importance to Newfoundland, when the Conference of Imperial Premiers took place in London in 1907, Sir Robert Bond, then Premier of Newfoundland, laid the whole matter before his fellow Ministers and sought sympathy, assistance and aid from the other representatives of the British colonies who were gathered there. His appeal fell upon no deaf ears, at all events, so far as Canada was concerned; it was not our quarrel, but they were our brothers, they were British subjects like ourselves, really they were in common cause with us, and we said by the mouth of Sir Wilfrid Laurier to Sir Robert Bond, go on and we will go in with you, we will join you, we will back you, we will share the expense and labour with you, and we will get, if we can, an authoritative settlement of this difficulty by a reference to the Hague. That was the genesis of this submission to arbitration which has been under way for the last three years.

Now, the question of International law which underlay this right to legislate on the part of the colonies, when it came to be threshed out by argument and decision, was one I have said of much practical difficulty. We, in Canada,

with our fellows in Newfoundland, had great difficulty in understanding the United States point of view. I certainly felt that difficulty for months. I am free to say I have never been able to get rid of it. but I will try to state it as best I can from their point of view.

The situation was evolved, I think, originally by the elder John Adams, one of the great men of the Revolution, afterwards President of the United States, a representative from Massachusetts, one of the negotiators of the Treaty of Peace after the Revolutionary war. He had been a practical fisherman—I do not know to what extent, but he speaks in his memoirs of knowing the subject, probably as a man who had fitted out fishing vessels and been sending them very possibly before the Declaration of Independence from Massachusetts, to the banks of Newfoundland and to the coasts of other British colonies upon the Atlantic. He said that, so strongly did he feel upon this subject, that he would sooner cut off his right hand than sign any Treaty with Great Britain which did not secure to the fishermen of the United States that which he felt was their inalienable right. His point of view was that those fisheries of the Atlantic coast had been discovered, exploited and made valuable by the enterprise of the colonists of New England, that it was their blood. and their treasure, which had won dominion over those fisheries from the Kingdom of France; and, taking that view, he sturdily maintained in 1783 that no peace could ever be entered into with Great Britain except upon the terms that the fishermen of the United States should have equal rights with the subjects of Great Britain in all the territorial waters of the Atlantic Coast of North America, and maintaining that position, he secured for his people a Treaty which in regard to the fisheries was so favourable to them, or considered at the time to be so unfavourable to the British, that the Imperial Government of that day fell by consequence of it, and from the time that it was ratified in 1783, even to this day, we of British birth look upon it as an International arrangement vastly to the advantage of the United States. In 1818, things were in much different position for Great Britain. Much had happened in the 35 years between 1783 and 1818. Trafalgar and Waterloo had been fought and won. Britain had emerged triumphant from the Napoleonic wars, and Britain, being in a position now, in 1818, to dictate terms, took the attitude that, so

far as the north Atlantic fisheries were concerned, you of the United States have lost your right, our Treaty of 1783 was at an end when the war of 1812 broke out, and it is now a question of a new grant, if it is a question of anything, and we will never consent to a renewal of the terms of 35 years ago, the only possible terms are the giving to you of a certain defined area along the coast of British North America. and a deliberate and final recognition on your part that elsewhere you have no longer any right. And so Great Britain. taking that position in 1818, it came to be a matter of great consequence to the United States to satisfy the British statesmen in office, that, as a matter of International law, their position was untenable. The contention was made that as a matter of International law the Treaty of 1783 had not been put an end to by the war of 1812, that its provisions were final and that no more had the United States by that war lost its right in regard to the British fisheries than it had lost its right to retain its land territory which had been assigned to it by the Treaty of 1783. The contention was then made by either the elder Adams or his equally distinguished son, John Quincy Adams, or by both, that these fisheries were no concession or gift from Great Britain in 1783; they were the property of the United States fishermen as of right, and that the Treaty of 1783 was simply a recognition of that right, and no grant or gift from England which war could afterwards abrogate or take away. And it was put upon this very ingenious ground, it was called a partition of Empire. and the contention was put forward and seriously maintained, which, as I say from our British standpoint, it is difficult to understand; but it was none the less dangerous, the contention that after the close of the Revolutionary War, when it came to be a question of settling the terms of peace, the representatives of the two peoples, who theretofore had been one, met together to partition to each an Empire and to assign to the successful 13 colonies its part, and leave to the old folks at home their part; and in that partitioning. not only had the land which was described in the Treaty as that of the thirteen colonies been awarded or yielded to the United States, but also the fisheries, and none the less that those fisheries were within British territory, the right to fish in them, it was contended, had been part of the partition, and no more could that part, which then had been assigned

to the United States, be forfeited by war or taken back by Great Britain after the war, than could the territory of the United States itself; and as a result of that partition theory or of that partition argument, which was maintained up to the end, and was argued this summer at the Hague, the view which undoubtedly existed in the minds of the statesmen of the United States was diametrically opposed to the view which we on this side of the line have always entertained, diametrically opposed to the idea that the fishermen of the United States were upon our territory or in our waters pursuant to any leave or concession on our part, the contention to wit, that they were there of right, exercising the right, which was their property from before the Declaration of Independence, exactly as they are exercising their right upon their land within their own limits to this day; and in that view the contention follows as a natural sequence, while we are not, it may be, when fishing in British waters, literally within our own territory, we are upon our own property, this was part of that which was given to us, allotted to us, for good consideration, in the partition, and that being so, we being here of right, how can you, consistently with the sovereignty of the United States, claim that without our consent you can pass laws that we must observe. And, viewed in that light, I think every one will agree that the argument certainly does possess not merely elements of danger but great strength and force, and that was the view entertained by many and many a learned writer in the United States. This contention, during all the years after it first appeared, had been maintained, and when we went into this arbitration two years ago, it was in the expectation that that line of argument, that that contention would be the mainstay of the United States position.

In the agreement of submission to arbitration we had, of course, defined the steps which should be taken. We had provided for what may practically be considered as written pleadings on a given date. So, some months in advance, each side was to deliver to the other a printed statement of its case, accompanied by a printed set of all the documents or evidence upon which it intended to rely, and then within a given further delay, each side was to answer the case of the other, and upon top of that each was to present on the opening day of the argument to the Tribunal, and to the other, a brief argument outlining the line of contention it intended to adopt.

We on the British side took the view, in preparing our case a year ago, that it would be well to do more than merely state the facts. Possibly I may have been myself to some extent responsible for the taking of that course. I certainly was still adhering thoroughly to the idea I had from the outset to get the first say, and, accordingly our case was much what we here in Ontario would call a factum in the Supreme Court, with very full reasons of appeal, and we did not by any means content ourselves with a bald statement outlining the facts which had grown up in the 90 odd years of history connected with this matter, but we to a considerable extent argued our case. The United States did not do so, and when they delivered their counter-case they took exception in it to the course which we had adopted, insisting that it was not one which had been contemplated by the submission to arbitration, and that we should have restricted ourselves, as they had done, to a simple statement of the facts; they said they preferred to reserve their argument until their written argument was delivered. That document was to be delivered on the opening day of the session, but a year ago now each side wanted to adjourn the beginning of the actual argument, which at that time was fixed for the first of April. On our part we were in practical difficulty from the engagements of our leading counsel in affairs of British politics. On their part possibly similar considerations existed—I don't know the reason—but the suggestion, I think, came in the first place from the United States, that the 1st of April was too soon and we had better postpone the actual beginning of the argument for a couple of months. At any rate, whichever side proposed it, the other promptly agreed, and by consent it was arranged that the argument should not begin until the 1st of June. In the making of the arrangement, I pointed out that it was scarcely fair to either side to expect counsel to plunge into the oral argument of the case, only receiving on the same morning the written argument of his adversary. No arrangement had yet been made as to which side was to begin, but hoping that we should get the opening, I thought that our counsel would not be in good position unless he had had some few days at least to see what line of argument upon the various questions was intended to be adopted against him, and readily enough our friends on the other side agreed to the proposal which I made that the written argument should

be exchanged on the 16th of May. On the evening of the 13th or the morning of the 14th of May this argument had not yet been delivered, but it was due on the Monday morning, and I was certainly very anxious to see it. The first glance at it was somewhat startling. because upon this question of the right to legislate an entirely new line of argument was adopted, which had never been up to that moment, nor in the long history of this matter, heard of or suggested —a most dangerous line of argument, and particularly dangerous possibly from the circumstance that our Tribunal consisted of four men trained in the Civil law with the fifth man the representative of the United States upon the Board. The argument was put forward and elaborated through many pages of learned discussion, that the doctrine which should govern the interpretation of this Treaty was the doctrine of servitudes, and that the legal effect of the agreement which Great Britain had made with the United States in 1818 was to constitute a servitude in all the Treaty waters of British North America, a servitude in favour of the United States in regard to which the United States was the dominant member and Great Britain the servient, and proceeding upon that theory the argument was elaborated, as it was afterwards presented to the Tribunal in days and weeks of most learned discussion, with reference and resort to hundreds of writers upon International law, that the true interpretation of the Treaty of 1818 was to be found in this branch of the case upon the application of the doctrine of servitudes in exact analogy to the like doctrine as between individuals. I do not know that there is any virtue in terminology; I do not know enough about Civil law myself to pretend to say whether the underlying idea conveyed by the phrase or expression "servitude" differs at all from our common law idea of an easement; but whether one differs from the other, or whether the two are convertible terms, the idea is readily enough grasped. Great Britain had, by the Treaty of 1818 granted, if you like, at any rate either recognized or given, to the United States no temporary liberty but leave forever, to catch fish in common with British subjects in its territorial coastal waters. What is the consequence? What is the legal effect? Nothing else than, according to the counsel for the United States, to create a servitude over British territory and a limitation of British sovereignty in favour of the dominant

tenement so to speak, the United States of America. And pursuing that line of argument, Mr. Senator Turner, who addressed the Tribunal first on the part of the United States, for eight days argued, with wealth of research and learning, strenuously for that position, quoting elaborately from writers on International law from the earliest beginning of the history of that branch of the law, and seeking to establish that once a servitude was created, the sovereignty of the servient country was necessarily thereby so limited or parted with that it no longer could legislate to bind the inhabitants of the dominant country. After I had read the argument, so far as I was concerned, I was much taken back, and I was more or less alarmed that the Tribunal would be taken with this argument; it looked captivating, it was strong, and it came to me as an utter astonishment. I did the right thing. I consulted counsel, as soon as I could see Sir Robert Findlay, and going up to his house, I found him in his library entrenched behind masses of books on the tables, and the floors covered with them, so that one could not get to the spider in the centre of the web without travelling over the volumes of law with which the floor was covered; and almost the first thing I said to him, after social greetings was, "what on earth are we going to do with this question of servitudes," and I was very much comforted by Sir Robert remarking quietly in his careful, peaceful, Scottish manner, "Oh, I am not much frightened at servitudes;" and I found in the result that there really was not any occasion to be frightened in regard to servitudes, alarming as they had appeared to me at first blush.

The whole doctrine is a metaphysical one, the outgrowth of the relations which existed a century or two ago amongst the minor States of the German Empire. One feudal State might possess by some compact between it and its neighbour, or possibly merely by long user, the right of passage for its troops across the territory of the neighbour; or by some international arrangement, an agreement might have been entered into to demolish the fortifications of some town and never to re-erect them; or a port might in one country be assigned to another country for a coaling station; or in later times the right given to some country to build a line of railway across the territory of a neighbouring State. In these situations, the metaphysical minds of German lawyers

described the relation which existed between the one State and the other by the possibly not inapt term of "servitude," taking it from the civil law, and discoursed in their various treatises upon the effect of international servitude, on the lines of private civil law, so that there were not one, but dozens and scores of volumes by learned Germans and writers upon International law of other nations, discussing the effect of such treaty arrangements as making the sovereignty of one country servient to that of another in virtue of the treaty relations which had been entered into between them. But later writers upon International law have thought that the supposed analogy between the law which should goven the relations of communities entering into arrangements of this sort and the private law which governs the relations of individuals in the like case is an analogy which should not be favoured. Only this summer some learned professor in one of the Universities of the Netherlands issued a book in the Dutch language, in which he happened to have said that the whole doctrine of international servitudes should be relegated to the lumber room. I need not say that the Tribunal was informed of that statement. But however applicable this doctrine may have been to the relations of the German States, as those relations existed in past generations, it seemed never to have been applied beyond that territory. It had never been put forward before in the course of international discussion either in reference to this particular treaty or any other treaties between any other peoples to which reference could be had. Every text writer upon International law who had discussed it took careful occasion to say it was a doctrine not to be extended, or even favoured, and that always, unless under express stipulation to the contrary, the maxim *praesumitur pro libertate* ought to be applied, and that no nation ought to be considered as relinquishing or limiting its sovereign supremacy over its own people. and its own territory, unless that result could be undubitably gathered from the treaty upon which it was supposed to be founded. In the result this Tribunal has, to the fullest extent, disallowed the applicability of the doctrine of servitudes to the treaty under consideration. The fact that that argument was put forward, and that it was made the main support of the contention of the United States, rendered our task in supporting our contention in one sense the easier, because the

doctrine, or the applicability of it, once overthrown, our adversaries were left in a comparatively defenceless position upon this branch of the case, and our course to success remained without substantial impediment.

The result upon this branch of the case has been certainly thoroughly satisfactory to Canada and Newfoundland. The Tribunal has affirmed that it is inherent in the sovereignty of Great Britain and all her Colonies that the Legislatures of those countries should have the right to make the laws for their own territories which must be observed by all peoples who resort thereto, and that regulating the operation of these fisheries by reasonable legislation cannot be properly considered as in any way derogating from the grant which Britain made in 1818.

Of course, it was never contended on our part that we could derogate from our own grant, any more than an individual could. In stating our contention, we took careful watch to guard against assuming any such position. We, in terms, disclaimed any right to whittle away or lessen the privilege which the Treaty had given to the fishermen of the United States, so, taking that position, the Tribunal, affirming it, has declared that so long as our laws are reasonable and do not unduly favour the local as against the foreign fishermen, they cannot be considered as any breach of the foreign fishing privileges. And in that view the right of the Legislature of Newfoundland and of the Parliament of Canada has been categorically affirmed to legislate in regard to those fisheries without reference to the United States.

The only other branch of this arbitration which involved to any considerable extent questions of International law was the possibly more important subject of "bays"—a more important question to Canada and at one time, though possibly not now—of as great or greater practical importance to the United States.

I propose to say a few words upon that subject, but I have already taken up too much time upon this other branch of the case, and I shall certainly try to be brief.

Under the Treaty of 1783, no restriction upon the British waters to which the fishermen of the United States might resort was in any way placed. Everywhere upon the Atlantic, which was then, of course, the only side of British North America, the fishermen of the United States might

freely come. That continued at any rate until 1812. From that time until 1818, the right was in abeyance, exercised when possible by fishermen of the United States, prevented when possible by the ships of Great Britain. In 1818, the attitude of Great Britain was that which I have tried to describe—the most we will do is to assign to you certain limited portions of the maritime coast of the North American colonies, and any claim of right you may have to resort to any other portion of the coast must be distinctly renounced. It then became simply a question between the plenipotentiaries on the one side to get as much of the coast to be within the Treaty as they could, and those on the other part to limit that extent of coast as much as possible; and in the result there was assigned to the United States fishermen, as their part of the coast of British North America, the portion which at that time and even to this date is least inhabited—the whole of the western coast of Newfoundland and about one-third of the southern—the western one-third of the southern coast—and, so far as Canada is concerned, simply the shores of the Magdalen Islands and that portion of the Labrador or northern shore of the Gulf of St. Lawrence, which lies between the southern entrance to the Straits of Belle Isle and the point on the mainland about opposite the east end of Anticosti. Those portions of British territory being assigned to the United States as treaty waters in which the inhabitants of the United States might thereafter forever take fish in common with British subjects, the Treaty proceeds to exact from the United States, and the United States in the most set terms gives an unequivocal renunciation of any right or claim of right which theretofore they had enjoyed to take fish within three miles of any of the coasts of British North America or any of the bays, inlets or creeks of that coast. I did not realise until I had reached Toronto this morning the fact that I had not brought with me any paper; and not only did I not have any paper of my own preparation, but that I did not bring with me any document to which I might refer to give the exact language of this Treaty, or any of the proceedings in connection with this case, so I am describing the provisions of the Treaty of 1818 from memory alone, and I am giving the substance of it. The first portion of the article consists of the grant by Great Britain to the United States of what is called the "liberty" or, in other words, the

"leave"—"liberty" is the word used in the Treaty—to take fish upon those defined portions of the coast which I have roughly outlined. Then follows the express renunciation in some such words as these: "And the United States of America hereby forever renounces any right or claim of right to take fish within three marine miles of the coasts or bays, creeks, or inlets of all the remainder of British North America." I have omitted and had forgotten in trying to repeat the renunciation a very important phrase—"of any of the bays, creeks or inlets of His Britannic Majesty's Dominions within North America." Now, that being the language of the renunciation, it was no time at all, a year or two at most, before trouble began. In 1820, 1821 and 1822, we find the records of the Admiralty Court at Halifax shewing cases of captures of United States fishing vessels within the waters of the Bay of Fundy; and even at that early date resistance made on the part of the fishermen of the United States to any contention that they had relinquished the right to fish in the centre of the Bay of Fundy. And the view in which that came to be presented when in the course of years it fell to be very vigorously argued, was that the centre of those wide bays was in no sense within the dominions of his Britannic Majesty. The fishermen of the United States said, and said, I think with a great deal of force, that the centre of a bay like the Bay of Fundy is open sea, and when you are measuring the territorial belt which adjoins the shore, you must measure round the shore line of any such body of water as the Bay of Fundy; you are measuring a line parallel to the sinuosities of the coast three miles seaward from low water mark and along the open coast, and drawing the line three miles seaward which bounds the territory of His Britannic Majesty, and when you come round Cape Sable and up into the Bay of Fundy you continue on that three mile line, you do not jump across to New Brunswick, to do so would be to trifle with language, although it may be that, geographically, you speak of the Bay of Fundy. But so do you of the Bay of Bengal, or the Bay of Biscay. And who would pretend that the waters of those great portions of the ocean are territorial waters of the country adjoining? And so practically from 1820 there has been continual difficulty between the British Colonies in North America and the United States upon that subject. That was and is of vast practical importance to Canada.

Take the whole coast line of Nova Scotia, never mind the Bay of Fundy for the present, and we remember how it is indented every few miles with harbours and inlets of different dimensions, shapes, and sizes, but all alike bays, and many of them across the entrance much more than six miles in width. Now the United States fishermen wants to get into those bays—probably there is the best fishing there, at any rate he says when I am abreast a wide bay like the Baie des Chaleurs, or if you please, Miramichi Bay in New Brunswick, Egmont Bay in Prince Edward Island, or Mahone Bay on the South Coast of Nova Scotia, and I find a sheet of water which, measured across from headland to headland might be anywhere from 10 to 15 or 20 miles .and I am supposing I am in the centre of that, 10 miles from the land on either side of me, and perhaps 100 miles from land ahead of me, do you mean to tell me I am in territorial waters? I am in the open sea, and I am not within his Britannic Majesty's dominions in America, and so in a case such as I have put, like the Baie des Chaleurs which is 16 or 17 miles across at the entrance and up which you can sail for 70 miles without getting within 3 miles of either shore, the fishermen of the United States said, we are here fishing not under any Treaty at all, we are here fishing by the common right of nations, because we are in the open sea, exactly as much as though we were on the great banks of Newfoundland itself. And Nova Scotia taking the opposite view and ably supporting it by its learned Attorney-General of 70 years ago, Great Britain adopted that view of Nova Scotia, and maintained at least from 1840, that the true method of measurement was by going from headland to headland right across the mouth of any bay regardless of its width. It was impossible to reconcile those two views. In 1845, Great Britain, as a concession, stating it to be a concession, gave up, or to use the language of the diplomatic letter which at that date Lord Aberdeen wrote to the Minister at St. James of the United States, Great Britain decided to relax her right so far as the Bay of Fundy was concerned, and since then there has been no more difficulty over the Bay of Fundy; but that was the extent of any relaxation which Great Britain was willing to make or ever did make. So in all the years, from 1840 to the present time, Great Britain had consistently maintained the contention that all these bays and inlets in the remainder of British North America,

that is to say, in what is to-day Canada, are bays and inlets, the right to enter which the fishermen of the United States have forever renounced. And we have maintained more than that. We have maintained that those waters are territorial waters, that they are within the sovereignty of Great Britain, that they are the property of Great Britain exactly as much as our farm-land is on shore. And, maintaining that view, we have had the very great satisfaction of finding it, by the award of the Tribunal the other day, sustained in its entirety, with the dissent of one of the arbitrators, the representative of the Argentine Republic, but with the concurrence of the United States member of the Tribunal, Judge Grey himself, to whom I think, at least, this tribute from me is due, that from first to last of this prolonged arbitration, he shewed himself to be not merely that which anyone at a moment's glance would recognize, a courteous gentleman, but a man animated with the sincere desire to do his duty in this arbitration, exactly as he would in any case that might be before him for adjudication between private litigants, and not to favour even his own nation against that which he thought was the law. (Applause.)

Now, the argument of that question of territoriality necessarily involves a consideration of the principles of International law upon the subject of the water belt surrounding the shore of any maritime nation. We speak in common language of the three mile belt as though it were a matter of course, and as though for three miles the water of any maritime territory was the territorial property of the adjoining nation. That has become undoubtedly so as a matter of International law; but it has not by any means become a fact that three and a half miles or four miles from the shore you have departed from territorial jurisdiction. The condition of International law on that subject seems to be that, while it is quite certain that a distance of three miles is territorial, it is equally certain there is no further certainty about it. You cannot tell what the limit of territoriality is. Nations have not agreed. Why, 100 or 150 years ago the pretentions which all maritime peoples were putting forward as to the ownership of the open ocean were amazing. Early in the history of the United States it was proposed by one of their leading statesmen that the Gulf Stream should be assigned as the territorial boundary of the United States, and those "pre-

tentions," as we of this age, or they themselves would term them, were not so very extravagant, having regard to the claims of other maritime nations which up to that time had been made. In 1816, I think, or thereabout, a British man-of-war seized a United States fishing vessel more than 60 miles at sea to the southward of Nova Scotia, contending that that was territorial water of Great Britain, and the British claims to territoriality were all but as extravagant, if I may use that word without any impropriety, as the claims I have just mentioned, that the Atlantic as far out into mid-ocean as even the Gulf Stream itself was the territorial property of the United States. Although in course of generations the limit has from time to time been by the views of text writers upon International law, cut down, it never has in any way been definitely fixed, and no one can say what the limit is to-day except that certainly by the common consent of all civilized peoples there is jurisdiction in the nation, over the belt of water which surrounds its shore, to a width of at least three miles.

Then, if that is settled as to the coast-line, what are you to do when you come to a big opening like a bay, all kinds of shapes, it may be a mere depression like a saucer, it may be a semi-circle, it may be a long stretch running inland miles upon miles and never consisting of any but comparatively narrow width, or it may be narrow at the opening, it may be only a mile or two in width, and, once inside, expand into a great body of water like the Zuyder Zee in Holland, the entrance to which, by the way, is less than six miles across, and become an inland sea of comparative dimensions much like our own Hudson's Bay? Now the two methods of measurement proposed by Great Britain on the one side away back in 1830 or 1840 and proposed by the United States on the other were diametrically opposed to each other. Singularly enough neither nation was willing to apply its own rule except in regard to British North America. The United States contended earnestly and strenuously that the bays or inlets of British North America were open sea except those six miles or less across at the entrance, and we were equally strenuous and earnest in saying that in similar circumstances the bays or inlets of continental Europe were extra-territorial. Britain, while contending that all these inlets in British North America were territorial, was maintaining strenu-

ously that the fiords or inlets in Norway, which no one can distinguish geographically, were open sea, into which the Scottish fishermen had every right to go. And so in this position of matters, neither side was in the least degree able to say to the other with any force, you are utterly inconsistent, because in all candour each had to admit that he *was* perfectly inconsistent, and the only truth was the language which the Attorney-General used in conversation one day in describing it, "the fact is, we want to keep all our own bays and steal everybody else's." However, that is but a burst of candour. The question for decision was, how have these waters been treated, as a matter of International law? And the foundation of it all takes us back as far as the days of Grotius, who, after all, laid down in his original treatise the only practical rule that can be followed, and that was, that you cannot apply to bays or inlets the same basis of measurement that you adopt upon the open and unbroken coast, of which you follow the sinuosities and the waving line of low-water mark; but when you come to any inlet into the land which possesses the characteristics or configuration of a bay, you must take into account its relative width at the opening with its depth, with the extent to which it is encompassed by the surrounding land, with the means by which it could be readily defended, because after all, the principle upon which the three miles of territorial limit depends is the defensibility by the adjoining nation of that extent of open water or sea. Grotius, laying down that general rule, everybody who has come since, has, if he has not adopted it and followed it, built upon it. And we practically start with that idea, that you have to consider the situation of each piece of water, but you cannot lay down any general rule. One bay may be not more than 7 miles across at the entrance and not be territorial, while the next bay, lying in the same coast, may be double the width at the entrance, and yet be territorial in whole, simply because it is a long, narrow-shaped piece of water and the whole conformation of its shore line at the entrance such as lends itself to the defence of that piece of water, so that the nation which owns the shore on either side can defend that piece of water against all comers, and can, if it pleases, appropriate it to itself and assert its ownership of it; and that after all is the underlying principle regarding the water of any particular

inlet, that it is territorial if it be defensible and not so wide that a man-of-war stationed in the centre might not lie in it and protect and defend all the shipping within against all comers. That is an element to be taken into consideration of very great importance upon this branch of the arbitration in question. Very much learning existed and a very great amount of discussion took place. We met with no surprise. Each side had taken up its position in that regard 70 or 80 years ago, and during all that long course of years each had consistently and persistently maintained its position. Now, when it comes to the decision of the International Tribunal, four out of five members of the Court have adopted and announced their support of the British contention, which makes all these bays of our maritime coast closed to the United States. I say that advisedly, because it is open to argument at any rate, though I have no doubt, that the effect of the decision of the Tribunal has not been to declare these waters territorial waters of His Majesty's dominions.. I, speaking as a Canadian, should certainly maintain that that is the effect of the decision. But I am quite free to admit that a lawyer can find argument to the contrary,—and that it is quite possible to rest the decision of the Tribunal upon the view that it has held these waters to have been within the renunciation of the treaty, to have been expressly renounced by the United States, territorial or not territorial. I think the better view, judging from what has been said by the Tribunal in reaching its conclusion, is, that they have maintained the full extent of the British contention, which was that undoubtedly the United States have forever renounced these waters, be they territorial or extra-territorial, but none the less we maintain they are territorial; and we say that there is a special rule of International law applicable to the bays of North America, at any rate to the Atlantic coast of North America, which has to be deduced from all the treaties in regard to those pieces of national territory which, from the discovery of America, has been entered into by the different European nations. Starting from the days of Spanish domination, followed so soon as it was by the coming of the English and the French, and from the earliest treaties that were entered into amongst those three nations, or between any two of them, we find, right down to the day of the Declaration of Independence and, immediately afterward in the

Treaty of Alliance entered into by the 13 colonies with France, each nation treating its bays regardless of size as territorial,ceding from one to the other, yielding dominion and possession of these waters without any limitation upon their size; and indeed in one instance, in the Treaty of Utrecht, a distinct grant and concession by France to England of the waters of Hudson's Bay; so that we find from first to last running through all the treaties among European nations which existed in regard at any rate to the eastern side of the North American continent, bays and inlets treated as the subject of grant to be deeded from one country to another exactly as the land would be granted. And in that view it is quite readily maintainable from the language which the Tribunal has used in coming to its conclusion, that there has been by the majority an affirmation of the view that water even as great in volume as that of the Bay of Fundy itself is British territorial water regardless of the width of the entrance to that bay. That is, of course, a question of prime importance to Canada, not merely in relation to that which is, comparatively speaking, a minor piece of water in our Maritime Provinces, but in regard to the vast inland sea I have spoken of which we know as Hudson's Bay. I trust—I think I might almost say, I think—we shall not have any question with any other people of the world in regard to the ownership and possession of Hudson's Bay, and of the wealth which undoubtedly its waters enclose. But at all events the Canadian Parliament has, within the last few years, in distinct terms asserted its claim, and passed an Act of Parliament in which in the preamble it expressly declares and recites that the waters of Hudson's Bay are waters of the Dominion of Canada. That is the view which we put forward before the nations of the world, and we trust that no one will challenge it. In regard to the other bays of the Atlantic coast, I think the question is settled—possibly I ought not to speak with any assurance upon that point, for I see that even already a very able article has appeared from the pen of an eminent lawyer in one of the Law Reviews of the United States, in which he has taken the position that, although the Tribunal has pronounced against the right of the United States fishermen to fish within any of the bays of Canada, yet if a fishing vessel in such a bay is more than 3 miles from land, it cannot be seized as within Can-

ada, and it cannot effectively be seized by any Canadian force. If, according to the contention of this gentleman, any such seizure was made, the Court would compel abandonment of the seizure because it had been effected beyond the territorial limits of the country which had made the seizure, and the only redress, according to his view, that could be had against the United States fisherman plying his vocation upon the central waters of any Canadian bay wider than six miles would be by proceedings against that man in the domestic Courts of the United States. Well, that is a contention which it may be will have to be seriously considered, which certainly will have to be if it is ever seriously put forward by the Government of the United States, but I am sanguine enough to think that that will never be. I think that in the United States as much as in Canada or in Great Britain there is a fixed rule not merely amongst the people of the country but with the Government which represents those people, that a contract is a sacred thing; and this arbitration was literally a contract, a deed of submission by which the governments of the two countries submitted themselves to the decision of the five men of their own choice constituting this Tribunal, and the decision which those men gave has been received as favourably in the United States as it has been received in Canada.

There are many points in connection with the matter upon which the United States has succeeded. I think that fortunately for Canada those points are not of such grave importance to us as the two which I have discussed, but there are other features of the questions which were submitted to arbitration in respect to which the decision has been unequivocably against us.

I am sure that we on our part, with our fellows in Newfoundland on their part, will loyally submit to and support the decision where it is against us; and I am sanguine to believe that with equal loyalty the decision will be supported in the United States upon the points which may seem adverse to them. I think that this world-wide and more than century long difficulty which undoubtedly on more than one occasion has brought the two great Anglo-Saxon nations to the very verge of war itself, has been definitely and finally settled, and I welcome the view that there is at least an end to this long difference and a great step forward taken in the work of international arbitration which looks to the day of universal peace. (Great applause.)

LEGAL EDUCATION IN ONTARIO.*

A few words by way of preface. First, I wish it clearly understood that although an officer of this association nothing which I may say is to be considered in any way as official, the matter never having been discussed either by the association or its executive. In the second place it is not my intention to charge any one with contributory negligence, nor to attack or disparage whatever has been done in connection with legal education either by the benchers or the staff of the law school. Let all praise be given to those who have striven zealously to raise the standard of legal education in this province, while we briefly and in the kindliest spirit examine some of its past and present phases and endeavour to peer a little way into the future of a subject of prime importance not only to the Bench, the Bar and the law students but to the people as well. If our training of law students is somewhat crude and antiquated it is our duty as lawyers to slough off what is cumbersome and useless. Difficulties will, I grant you, be found in effecting any change, but none of these are insurmountable; interests there are many and varied which must be carefully considered, but none I think which cannot be reconciled.

At the outset let me sketch from the standpoint of an active practitioner, a short biography of the average law student. He has either been graduated from or is a matriculant of some university, as the Law Society of Upper Canada does not now insist on its own entrance examination. If the former he must be articled for three years and attend three successive sessions at the Law School, his only office experience being in the intermittent periods between sessions and lectures. If a matriculant, his articles run five years, and he must attend three sessions of the Law School during his third, fourth and fifth years of service. Generally he is about sixteen or seventeen years of age, ordinarily indeed too immature to begin the study of law. Having deposited with the Law Society his matriculation certificate, he is entered on the rolls and starts out to find a lawyer needing assistance. When such a one has been found the usual monetary conversation takes place. In earlier days a premium often was

* Address by Mr. Charles Elliott before the Ontario Bar Association, 29th December, 1910.

paid to get into a good law office, but nothing of the kind is now met with, not because there are no good law offices, but the times have changed. Our typical lawyer points out, and quite properly so, how comparatively useless the student will be in the office during his first year at least, and enlarges on the vagrant bits of legal information to be found floating around his office and awaiting capture. Finally the student is made happy by being promised the standard union wage of two dollars per week. Doubtless he is not much good either to himself or his principal during the first year of service. His surroundings are novel and it takes him some time to get acclimatized. He does odd jobs, runs messages, sweeps the office, lights the fires, copies letters, goes for the mail, serves and files papers, does a good deal of just sitting around, occasionally is honoured by carrying his chief's red brief bag, the blue having largely gone out of fashion, and now and again copies some documents full of technical terms entirely unknown to him. He is a little lower than the stenographer, but as he is studying law, officially he is a few degrees above the office boy. His wages fairly indicate the value placed on his services. If not studious he worries little about books. Very probably as it is alleged he is studying law he may pick up a calf bound book, but his eyes not yet being open this class of literature soon palls. One day when the principal is out someone calls and he has his first experience in meeting a client face to face. During his second year this so-called practical method of instruction is continued but possibly with some improvement. With considerable trepidation he now ventures into the Judge's Chambers, gets on a better footing with the Court officials, has a bowing acquaintance with the lawyers in town and in "talking shop" with his fellow students introduces legal phraseology with a fair degree of *sang froid*. With some better success than in his first year he may read a little law and get familiar with the books in the law library by hunting them up for his chief and carrying them into Court where he timidly steals into a chair at the barristers' table. Indexing, filing, docketing, copying onward through this year he goes until the time comes when he must get ready to go to the Law School. Any heart to heart talks which have taken place in the office over points of practice, questions of law, the conduct of a case, the handling of clients, or the thousand and one things which should have been taught have

been valuable but mainly so on account of their rarity. Here it may be mentioned that it is during this chrysalis period of the student's life that lawyers outside of Toronto mainly get students in their offices for it is compulsory after the second year of service for the matriculant student to attend the Law School at Toronto. From now on my remarks apply to the graduate as well as to the matriculant. Our student's theoretical training is now beginning. The Law School term begins on the last Monday in September and ends on the last Monday in April. Two lectures daily are given in each year of the course on Monday, Tuesday, Wednesday and Thursday of each week, the lectures being of one hour's duration, and are delivered generally speaking from 9 to 10 and from 4 to 5. Attendance at the Law School is counted on the articles, but the student is allowed if not encouraged to work in an office as well. After the school term ends he may return to his office in the country. If he does he will find old connections broken, new interests awakened and the quiet time of the legal year approaching. Similarly pass his 4th and 5th years. Every year he passes the Christmas and Easter law school examinations, and on passing his final examination is called to the Bar, and sworn in and enrolled as a solicitor. The papers for these examinations are not set by the staff but by young practising lawyears not otherwise associated with the Law School.

This hurried glance backward may serve to call to mind our own student days whether at the Law School or prior thereto, as well as our teaching and training of those who have been articled to us from time to time, and may help to emphasize what it is submitted are inherent weaknesses in our present system of legal education. Deep buried in the past lie its roots. They may be traced to the training given in England to students reading for the Bar and clerks under articles. The former read in barristers' chambers the latter served an apprenticeship in solicitors' offices. Originally in this province there was the same division, but now every barrister is also a solicitor. Having made the two professions into one, we have sought to combine the two methods of instruction, to add an unknown quantity and shake them all together with perhaps not the happiest result.

The apprentice system, the fetish of many lawyers had no doubt, advantages in earlier days when the student had not only to work in a law office during the two years de-

scribed, but as well during the remaining three years of his articles. Frequently he served the five years in one office, or four there, and the fifth in the office of the Toronto agents of his principal. Two important features in this craft training as formerly taught were; (1) the continuous office work and (2) the necessity of writing everything in longhand and making copies in the same patient way. The former has disappeared. The first and second years of the matriculant may be unbroken, but after that he, like the graduate, must attend the Law School sessions. Each may work irregularly in a Toronto office between lectures but from term to term each frequently goes from office to office, all the time the law school studies and examinations hovering over them. In the second place the introduction into law offices of stenographers and typewriters has almost entirely done away with longhand. Everyone now requires that all correspondence and documents be typewritten, with the result that the student has been robbed of whatever benefits it was claimed he received from this branch of his work.

Having viewed the changes in the student's office work let us now examine the capabilities of the solicitor for teaching law. What is the obligation undertaken by a solicitor to whom a student is indentured? Is it not "that by the best ways or means at his disposal and to the utmost of his skill and knowledge he will teach and instruct or cause to be taught and instructed this student in the practice or profession of a solicitor of the Supreme Court of Judicature for Ontario, which he now doth or shall at any time hereafter during the term of the articles use and practice, and further that he will cause and procure this student to be admitted as a solicitor of the said Court, &c."? Is the first part of this obligation fulfilled? With the best intentions is it not largely a formality? The student is told to go and he goeth, come and he cometh. How many solicitors will sit down for an hour or half an hour with their students and thresh out questions of law, the procedure in an action, etc., etc. Have you ever talked over with and explained to your student some of the difficulties perplexing him in his text books? Few if any of us do this because we are too busy trying to earn a living or perhaps we are a little shaky on the elementary principles which he is trying to master, or we have got out of the examination habit. In truth we are only practitioners of the law, not teachers of it. Teach-

ing law like teaching any other subject is a gift which few possess, and they only retain who continue to cultivate it. It is not suggested that a student cannot obtain some knowledge of law and practice in an office but it is submitted that what is acquired is most inadequate for the time spent in the office. What he gets now consists of miscellaneous scraps and fragments destitute of cohesion or symmetry. How then can office work be taught? No doubt if lawyers had the teaching gift and would take the time, much might be learned in a law office, but the difficulty is that they are not teachers, that they have not the time and that modern conditions have so changed office work for the student that most of the time spent in an office is now wasted. Why can not law teachers, teach law methods as school teachers instruct intending teachers in methods of teaching. Business colleges teach methods of business. If the staff of the Law School had the time, they could if solely interested in teaching, instruct the students in correspondence, routine office work, docketing, law bookkeeping, conveyancing, practice, etc., infinitely better, I submit, than is now done or supposed to be done by lawyers in their offices. The old delusion that office work can be only taught by apprenticeship dies hard. It has been proved irrefutably that law can be taught by duly qualified teachers to duly qualified students. If there were normal or model law offies like there are normal or model schools where the lawyers gave their undivided attention to their students who were working continuously for a year or two years then some good training no doubt would be experienced, but we have nothing of the kind. Better therefore will it be to transfer this so-called practical training to the Law School where it will be given by teachers who are experienced lawyers, not absorbed in the development of their own practice, but animated by one desire, that is the welfare of the student.

The following changes are therefore urged in order that the standard of our legal education may be raised:—

(1) That none but graduates be admitted to the Law School, matriculants being too immature to begin a scientific study of law as a life work. Fifty per cent. of those now in attendance at the law school are graduates. The wider and deeper the knowledge of a lawyer the better for himself and

his clients. Lawyers desire to improve the status of their profession. The time has come, therefore, to require that before a student enters on the study of law he should be graduated from some recognised university and be at least nineteen years of age. Studying law is work for men.

(2) That while attending Law School no office work should be permitted.

(3) (a) That practice should be solely taught at the Law School, or (b) if office work be a *sine qua non* that one year's work in an office be required after but on no condition before the student has been graduated from the Law School.

(4) That the permanent staff of the Law School should consist of five teachers at least who have been active practitioners but none of whom while on the staff are to be permitted to engage in active practice. The staff at present consists of the principal whose whole time is given to the work, and four lecturers who are engaged in active practice. Now should the work be increased as I suggest, it would necessitate that there should be a permanent staff of at least five. I was glad to see that the learned principal, in a recent report, urged the appointment of a permanent vice-principal, a step certainly in the right direction, but this was somewhat summarily turned down by the Legal Education Committee of the Law Society. The first principal of the Law School was not required to give all his time to school work, but this was no doubt recognised to be a disadvantage and the position was made permanent. So should it be with the lecturers. Is it not entirely reasonable that the results aimed at can only be obtained by those who are prepared to devote their whole time to teaching? Is it not only human that a lecturer in active practice, which he is naturally anxious to enlarge must give first attention to his office work which is all absorbing? The best results can only be obtained from those whose hearts are in their teaching, who are free from the exacting demands of the office and whose only concern is the students.

(5) The law school examination papers should be set by the staff who are cognisant of what has been taught, and who have the confidence of the profession that the standard aimed at will be maintained.

(6) That on the Law Society receiving a certificate from the Law School that a student has passed his examinations, he should be called to the Bar and enrolled as a solicitor.

(7) That the Law School curriculum should be broadened so as to provide not only for the scientific study of law but as well for the practical training required by a lawyer. Had the Law School teachers the time, they could give effective instruction in the proper preparation of an action for trial, its presentation to a Judge and jury, the logical argument of a motion or an appeal, the routine of an office, the elucidation and distinguishing of facts, how and where to find the law and its application to these facts, interviews and business relations with clients, etc., etc. Two things are essential in a legal education: (1) the knowledge of a certain number of facts, (2) the habit of correct reasoning on legal questions with a ready and accurate perception of legal analogies, and of these the second is the more important.

(8) That the teaching week at the Law School should cover five days, not four as at present, and that the term should run from 1st October to 30th June with four or five lectures daily.

But it is asked if the Law School be given a permanent staff how is the expenditure to be provided for. This leads me to examine a little into the financial history of the Law School.

The Law School was established on its present basis in 1889. There was not sufficient room or proper accommodation for such a school so in 1890 a students' room was erected at a cost of $1,046.14. Then the Benchers decided to erect a new building which was completed in 1892 at a cost of $32,364.25 in all $33,410.39. The students during 1889 and 1890 paid $40 which was increased in 1901 to $50, and now is $100 per annum. This is the only source of revenue. The expenditure is represented by the salaries paid to the staff, caretaking, insurance, heating, lighting, etc. The following figures shewing the receipts and expenditure in connection with the Law School from 1889 to 1909 inclusive, the figures for 1910 not yet being available, have been gathered from the annual financial statements of the Law Society.

THE ONTARIO LAW SCHOOL.

	Receipts.	Expenditure.
1889	$ 1,300 00	$ 3,829 94
1890	1,610 00	10,464 44
1891	4,040 00	11,983 11

	Receipts.	Expenditure.
1892	$7,120 00	$12,681 71
1893	5,825 00	13,644 79
1894	4,235 00	12,948 25
1895	4,525 00	14,816 12
1896	4,775 00	14,983 07
1897	4,540 00	14,745 58
1898	3,485 00	14,930 74
1899	3,687 50	14,515 50
1900	5,240 00	14,617 68
1901	7,280 00	14,857 44
1902	6,910 00	15,063 57
1903	6,800 00	14,818 00
1904	6,570 00	14,846 06
1905	6,370 00	14,652 12
1906	11,240 00	14,700 15
1907	13,575 00	14,777 11
1908	16,255 00	14,610 41
1909	19,925 00	14,682 11
Total	$145,307 50	$287,167 90

The total expenditure is therefore $141,860.40 more than the receipts, or with the cost of erecting the Law School buildings $33,410.39, the lawyers of this province have contributed towards legal education $175,270.79 for which the Law Society has no tangible assets but the Law School buildings.

Before the Law School days we studied law at our own expense. While we may desire to see the standard of legal education raised it does not follow that we are so self-sacrificing as to be educating law students partially at our own expense in order that we may increase the number of rival practitioners, or to send lawyers to other provinces. If the Law Society is in danger of becoming too wealthy other excellent avenues might be found for using this money, such as making increased grants to the county law libraries, etc., or the annual fees might be reduced. I am not aware that the members of any other profession, trade or business dispense such a lavish generosity, or are so deeply interested in the welfare of their future competitors. It does not appeal to me as either good business or common sense. But why disturb matters, it is said, when the receipts exceed the

expenditure as they are now doing, the 1909 receipts being $19,925 as against an expenditure of $14,682.11. Well if the School is put on a proper basis as I have outlined above the expenditure will be considerably increased at a rate greater than the increase of the attendance at the School. I do not think that there is any binding obligation on the part of the Society to recoup itself out of the present receipts from students in order to provide for the expenditure when the attendance was smaller and the fees lower. Nor am I an advocate of high fees for students with many of whom it is a struggle in order to educate themselves. If it were possible I would gladly see the students' fees lowered.

Next I am asked if you propose a Law School as suggested, how is it to be maintained if the fees received from the students are insufficient and if the Law Society will not come to its aid. My answer to this is that we are officers of the Courts maintained by the province. The province is deeply interested in having the legal profession maintained at a high standard for, without mentioning other reasons, it is from it are drawn the Judges of the Courts. The province has been and is supporting the Provincial University nobly. It is therefore to that University that we should look for what is now lacking, a faculty of law practically backed by the province which would be strong enough to carry on a Law School on a basis which would make it a credit to our country from all parts of which students would be drawn on the establishment of a strong law faculty. The opportunity is exceptional. It would be advantageous to both the University and the Law School. The former would be a complete university, the latter strengthened financially would have its status raised by being a department of a University so widely and favourably known. Many not aware of all the circumstances in connection with the Law School as at present conducted are apt now to place it on the same plane as many small private law schools in different parts of the United States. This is not the time, nor the place to describe the great law faculties of Harvard, Yale, Columbia, Michigan and other universities. Nothing is more entertaining to one interested in legal education than to read the history of the Harvard Law School, growing from a small handful with little endowment, but with a band of permanent teachers impregnated with the spirit that law should be scientifically taught. Splendid testimony is borne to the

excellent work done at the Harvard law school by Ambassador Bryce, and such well known English legal writers as Dicey, Pollock, Hazeltine and others. The views of Ambassador Bryce on the subject of legal education in the United States are worthy of being mentioned here. I quote from page 670 of the new edition of his well-known work *The American Commonwealth* where the following may be found. "I do not know if there is anything in which America has advanced more beyond the mother country than in the provision she makes for legal education.

Modern England seems to stand alone in her comparative neglect of the theoretic study of law as a preparation for legal practice. Other countries from Germany at the one end of the scale of civilisation to the Mohammedan East at the other end, exact three, four, five, or even more years spent in this study before the aspirant begins his practical work.

As far back as 1860, when there was nothing that could be called a scientific school of law in England, the Inns of Court having practically ceased to teach law, and the universities having allowed their two or three old chairs to fall into neglect and provided scarce any new ones, several American universities possessed well-equipped law departments, giving a highly efficient instruction. Even now, when England has bestirred herself to make a more adequate provision for the professional training of both barristers and solicitors, this provision seems insignificant beside that which we find in the United States, where not to speak of minor institutions, all the leading universities possess law schools, in each of which every branch of Anglo-American law, *i.e.* common law and equity as modified by federal and State constitutions and statutes, is taught by a strong staff of able men, sometimes including the most eminent lawyers of the State.

Here, at least, the principle of demand and supply works to perfection. No one is obliged to attend these courses in order to obtain admission to practice, and the examinations are generally too lax to require elaborate preparation. But the instruction is found so valuable, so helpful for professional success, that young men throng the lecture halls, willingly spending two or three years in the scientific study of law which they might have spent in the chambers of practising lawyers as pupils or as junior partners. The indirect

results of this theoretic study in maintaining a philosophical interest in the law among the higher class of practitioners, and a higher sense of the dignity of their profession, are doubly valuable in that absence of corporate organization on which I have already commented."

But will the University be willing to create a law faculty? Let us briefly trace what the University has already done to arrange for combined action with the Law Society. In May, 1887, the Senate of the University of Toronto invited the Law Society to consider the question of the establishment of a teaching faculty of law in that University. In June, following, the Society appointed a committee to confer with the Senate, additional members having been added to the committee and special instructions given on the 17th February, 1888. On the 14th April following, the report of that committee was considered and a special committee appointed to go into the whole question of legal education. On 26th December, 1888, this committee reported in favour of reorganising the law school, that the attendance should be made compulsory, that lectures should be delivered at Toronto only, that the law course should not be shortened, and that no arrangements should be entered into with any university. On further consideration on the 4th January, 1889, it was resolved that it was not expedient to express an opinion regarding making arrangements with universities. It was decided to plow the lone furrow, and the Law School, as we know it, came into being. On the 16th May, 1905, the Senate again shyly proposed closer relations, but after appointing a committee the coy benchers with almost maiden reserve decided on the 23rd November, 1905, that the committee should not report. Shortly before this about 16th November, 1905, the commission which had been appointed by the provincial Government to consider the reorganisation of the administration of the University of Toronto communicated with the Society asking for a committee to be appointed to meet that body to consider the union of courses in connection with the law faculty of that university. A committee was appointed, but on the 8th February, 1907, matters were directed to stand until action was taken by the Legislature to see how the governing powers would be applied.

I cannot find that anything further has been done in connection with this matter by either party. It appears, there-

fore, to be the Benchers' move. In my humble opinion steps should be taken at once to bring about some arrangement with the University of Toronto whereby provision would be made for a Law Faculty of high standard whose teaching and examinations would be acceptable to the profession, the faculty being practically under the control of the Society's representatives on the senate.

It would not be proper to enter into a discussion of the details of such an arrangement here, all that is sought to be done being to advocate the principle from the standpoint of a practising solicitor, and to ask for its careful consideration.

What has been proposed regarding changes in the present Law School would apply *mutatis mutandis* to the proposed University Law School.

The present Law School should then be discontinued and the Law Society should accept the law degree of the University for admission to the Bar and for enrolment as a solicitor, either under 3 (*a*) or 3 (*b*) above, as may be deemed advisable.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(LORD MACNAGHTEN, LORD COLLINS, LORD SHAW and SIR ARTHUR WILSON.)

[DECEMBER 2ND, 1910.

THE BANK OF MONTREAL v. STUART AND ANOTHER.*

Canada—Husband and Wife—Contract—Separate Estate—Security for Husband's Debt—Independent Advice—Undue Influence.

In transactions between a husband and wife the burden of proving undue influence lies upon those who allege it.

"Nedby v. *Nedby"* (5 De Gex and Sm. 377) approved.

In transactions between a husband and wife the husband's solicitor owes a duty to the wife, where her interests are concerned, to advise her and place her position and the consequences of what she is doing fully and plainly before her. If she rejects his intervention he ought to insist upon the wife being separately advised.

Decision of the Supreme Court of Canada (41 S. C. R. 516) affirmed.

This was an appeal from the judgment of the Supreme Court of Canada of April 5, 1909, reversing decisions of the Court of Appeal for Ontario and of Mr. Justice Mabee.

The arguments were heard last April before a board composed of Lord Macnaghten, Lord Collins, Lord Shaw and Sir Arthur Wilson, when judgment was postponed.

Sir Robert Finlay, K.C., *Mr. A. Bruce,* K.C. (of the Canadian Bar), and *Mr. H. Bischoff,* appeared for the appellant bank; *Mr. Danckwerts,* K.C., *Mr. Simon,* K.C. (now Solicitor-General), and *Mr. W. J. Elliott,* for the respondents.

LORD MACNAGHTEN, in now delivering their Lordships' judgment, said the action which had given rise to this appeal, was brought by Mrs. Stuart, a married lady living

*27 T. L. R. 117.

with her husband, the respondent Mr. John Stuart, against the Bank of Montreal with the object of setting aside a series of transactions in connection with the Maritime Sulphite Fibre Company (Limited), in which she became involved at the instance of her husband for his accommodation, and the accommodation and benefit of his associates. The company and its shareholders, who were only five in number, were at the time under heavy liabilities to the bank. Mr. Stuart himself had no available means. Everything he had was embarked or sunk in the company. The transactions in question began by Mr. Stuart, who was impecunious and strangely sanguine, offering his wife as security to the bank for some further advances which his associates, more solvent and less hopeful, were unwilling to guarantee. They ended in the transfer to the bank of everything Mrs. Stuart possessed, so that in 1904 she was, as the bank was informed by its solicitor, "absolutely cleaned out."

The trial Judge dismissed the action, with costs, holding in effect that Mr. Stuart exerted no undue influence over his wife, that she perfectly understood what she was doing and acted on her own uncontrolled judgment, and that no unfair advantage was taken of her. The Judge was prepared to hold that Mrs. Stuart received ample consideration for the liability she undertook, though he did not rest his decision on that ground. In the Court of Appeal for Ontario, which consisted of four members, two Judges agreed with the trial Judge. Mr. Justice Garrow thought that Mrs. Stuart was entitled to relief, having regard to the peculiar facts and circumstances of the case. The Chief Justice also thought that Mrs. Stuart was entitled to relief, but he based his judgment on the case of *Cox* v. *Adams,* in the Supreme Court of Canada, 35 S. C. R. 393, which decided, or was supposed to have decided, that no transaction between husband and wife for the benefit of the husband can be upheld unless the wife is shewn to have had independent advice. As the Court was equally divided the judgment of the Court below was affirmed.

On appeal to the Supreme Court of Canada which consisted of five Judges, one was for dismissing the appeal; the other four learned Judges held that the case was concluded by *Cox* v. *Adams,* and pronounced judgment in favour of the plaintiff. From that judgment the Bank of Montreal obtained special leave to appeal to His Majesty

in Council. Their Lordships did not think that the doctrine supposed to be laid down in *Cox* v. *Adams* could be supported, and in fact no attempt to support it was made by the learned counsel at the Bar who appeared for Mrs. Stuart. On the other hand their Lordships were compelled to take a view of the facts and circumstances of the case very different from that which commended itself to the trial Judge and the Judges who agreed with him. Mrs. Stuart was the only child of Mr. John Jacques, a wealthy manufacturer in Toronto. In 1856 she married Mr. Stuart who was the head of a wholesale grocery business in the city of Hamilton and became vice-president, and afterwards president of the Bank of Hamilton. No settlement was made on Mrs. Stuart's marriage. But in 1873 her father bought for her a valuable residence near the city of Hamilton, called Inglewood. It was conveyed to Mr. Stuart in fee simple. In 1875, at the request of Mrs. Stuart's father, Mr. Stuart executed a deed declaring that the property had been bought in trust for his wife, and that he stood seized thereof for her sole and separate use free from his control and engagements.

In 1886 Mrs. Stuart's father died. He left everything to his daughter, and made her executrix with a gentleman who declined to act. Under his will Mrs. Stuart became entitled to property of the value of $250,000 or thereabouts. From her father's death Mr. Stuart assumed the entire management of his wife's property. Throughout the transactions which were impeached in the action, Mr. Alexander Bruce, Q.C., was the solicitor for the Bank of Montreal. He was also, during the earlier part of the transactions Mr. Stuart's solicitor. He had been solicitor for a railway company of which Mr. Stuart was president, and was thus, as he says, "brought in contact with him a great deal." He admits that "undoubtedly" he was "the personal solicitor or personal legal adviser" of Mr. Stuart, adding, however, that he thought he was not so in everything. But it is not suggested that in these transactions until July, 1904, Mr. Stuart had any other solicitor of legal adviser.

In 1886, Mr. Stuart, who was then worth some $250,000 of his own became interested in the Sulphite Company. At his suggestion Mr. Bruce joined him in the venture. Mr. Stuart became president and Mr. Bruce a director and secretary of the company. Its works were at Chatham, New

Brunswick. From the first the company seems to have been unsuccessful. Never once apparently during its struggle for existence did it pay any dividends on its shares or any interest on its bonds. Its nominal capital originally was $100,000. In 1891 it owed $275,000 to the bank. In that year it obtained a special Act of Parliament authorising the issue of preference shares and bonds. The preference as well as the ordinary or common shares were all shares of $100 each. The only shareholders in the company at the time were Mr. Stuart, Mr. Bruce, Mr. A. B. Lee, Mr. Leys, since deceased, and a Mr. Brown. The company created and issued 1,000 preference shares, which were all taken by the five shareholders and paid up in full. The proceeds were handed over to the Bank of Montreal. By this payment the debt to the bank was reduced to $175.000 which was guaranteed by bonds of the company, and a promissory note for $100,000 executed by the company and by Mr. Stuart. Mr. Stuart received a counter-guarantee signed by the other shareholders for different amounts under which Mr. Bruce became liable for $26,500. The benefit of the counter-guarantee was assigned over to the bank.

At the end of 1895 the company was in great straits. It owed $100,000 to the Bank of Hamilton, and another sum of $100,000 to the Bank of Montreal, in addition to the old debt of $175,000, which in the beginning of 1896 amounted with interest to $196,052. For each of the two sums of $100,000 Mr. Lee and Mr. Stuart were jointly and severally liable. It was then proposed by Mr. Stuart that he should pay the $100.000 owing to the Bank of Hamilton, and that Mr. Lee should pay the $100,000 owing to the Bank of Montreal, and that the bank should be asked to find further advances, which it was thought the bank would be willing to make on the security of materials in the hands of the company. Mr. Lee fell in with the proposal, and paid the Bank of Montreal $100,000. Mr. Stuart, whose means were then exhausted, discharged the $100,000 owing to the Bank of Hamilton by getting his wife to sign a note for $125,000 as for a loan to her. The Bank of Hamilton discounted the note and Mr. Stuart paid it out of his wife's moneys.

The Bank of Montreal, it seemed, was willing to allow the Sulphite Company to overdraw to the amount of $50.-000, which, it was supposed, would be sufficient for its im-

mediate needs. But the bank declined altogether to make any further advances without the personal security of the shareholders in the company. Thereupon Mr. Bruce prepared a guarantee for $50,000, limited to future advances. He signed it himself and sent it to Mr. Stuart for his and Mr. Lee's signatures. Mr. Lee hesitated, and required time to consider his position. Then it occurred to Mr. Stuart who had just dissipated half his wife's fortune in satisfying the claim of the Bank of Hamilton, to offer his wife as a guarantor to the Bank of Montreal, and he accordingly did so. Mr. Lee had refused to throw good money after bad. After a correspondence between Mr. Bruce and Mr. Stuart and the bank the shareholders (other than Mr. Stuart) agreed to sign a contract prepared by Mr. Bruce by which they mutually undertook to transfer to Mrs. Stuart 134 preference shares and 100 ordinary shares as a consideration of her giving a guarantee to the bank to the amount of $100,000. Mr. Bruce had no communication with Mrs. Stuart until she appeared in his office with her husband and signed the guarantee. In the meantime Mr. Stuart had written to the bank in reply to a request for information as to his wife's means, but not mentioning that the amount he indicated had been diminished by $125,000, for which Mrs. Stuart had bound her estate in favour of the Bank of Hamilton. Simultaneously with the execution of the guarantee by Mrs. Stuart two other instruments were executed—one the shareholders' agreement referred to, and the other an indenture made between Mr. Stuart, Mr. Lee and Mrs. Stuart, by which certain advances which Mrs. Stuart had made through the Bank of Hamilton were postponed to her claims in respect to her advances to the Bank of Montreal under the new guarantee. In July, 1896, Mr. Stuart procured his wife to assign to trustees for the bank mortgages for $27,000 to secure advances for machinery, and in April, 1898, he procured her to sign another guarantee to the bank for $125,000 which included the former guarantee for $100,000. In 1901 the company went into liquidation. On October 2, 1903, Mrs. Stuart and her husband gave the bank a mortgage upon all her real estate. The result of those transactions was that Mrs. Stuart surrendered to the bank all her estate, including Inglewood, and was left without any means of her own. Mr. Stuart had nothing but a life annuity or retiring pension from the Bank of Hamil-

ton, which the Bank of Montreal claimed in the event of Mrs. Stuart succeeding on this appeal.

The evidence was clear that in all those transactions Mrs. Stuart, who was a confirmed invalid, acted in passive obedience to her husband's directions. She had no will of her own. Nor had she any means of forming an independent judgment even if she had desired to do so. She was ready to sign anything that her husband asked her to sign and do anything he told her to do. At the same time it was right to say that in her evidence she repudiated the notion that any influence was exerted or any pressure put upon her, or that her husband made any misrepresentation to her. She said she acted of her own free will to relieve her husband in his distress and that she would have scorned to consult anyone. She certainly knew that she was incurring liability in order to help her husband and the company in which he was interested. Her declarations in the course of her cross-examination that she acted of her own free will and not under her husband's influence merely shewed how deep-rooted and how lasting the influence of her husband was. Proceeding Lord Macnaghten said: Such being the facts of the case, can these transactions stand? Their Lordships accept the law as laid down by Vice-Chancellor Parker in *Nedby* v. *Nedby*. 5 U. C. Gex and Sm. 377, to the effect that in the case of husband and wife the burden of proving undue influence lies upon those who allege it. It is difficult to determine in any case the point at which the influence of one mind upon another amounts to undue influence. It is specially so in the case of husband and wife, for, as Lord Cranworth observed:— "The relation constituted by marriage is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish." *Boyse* v. *Rossborough*, 6 H. L. Cas., at p. 48.

It may well be argued that when there is evidence of overpowering influence and the transaction brought about is immoderate and irrational, as it was in the present case, proof of undue influence is complete. However that may be, it seems to their Lordships that in this case there is enough, according to the recognized doctrine of Courts of Equity, to entitle Mrs. Stuart to relief. Unfair advantage

of Mrs. Stuart's confidence in her husband was taken by Mr. Stuart, and also, it must be added, by Mr. Bruce. Their Lordships do not attribute to Mr. Bruce intentional unfairness, but Mr. Bruce was in a position in which it would have been almost impossible for any man to act fairly. He was solicitor for the bank. He was legal adviser for Mr. Stuart. He took upon himself to enter into negotiations with his fellow-shareholders on behalf of Mrs. Stuart. Above all, he had, as the managers of the bank well knew, a strong personal interest in procuring Mrs. Stuart to give the guarantee. He knew that all Mr. Stuart's means were embarked in the company and no one knew better than he that unless some one came forward and guaranteed the bank in respect of further advances his own interest and the interest of his associates as shareholders were worth nothing and his claim as a creditor in all probability equally valueless. He and his associates other than Mr. Stuart were unwilling to risk their own moneys. Mr. Stuart had no money to risk. The game Mr. Stuart was playing was desperate. It was the throw of a gambler with money not his own. No man in his senses with any regard to the interest of Mrs. Stuart or the interest of Mr. Stuart could have advised Mrs. Stuart to act as her husband told her to do. The bank left everything to Mr. Bruce and the bank must be answerable for what he did. Without communicating with Mrs. Stuart, Mr. Bruce of his own motion extended the guarantee to past advances from the Chatham branch. More than that, he took upon himself to act on behalf of Mrs. Stuart in procuring the transfer of shares to her by way of consideration undertaking a risk which neither he nor any of his solvent associates were willing to accept. And the consideration, as he must have known if he had considered the matter, was absolutely illusory. It was worse than illusory, for it fixed Mrs. Stuart with a common interest in the fortunes of the company and no doubt relieved her husband from any feeling of compunction in getting his wife to make so great a sacrifice for the benefit of the shareholders and afterwards dragging her deeper into the mire. Now, it has been laid down in the House of Lords that the husband's solicitor owes a duty to the wife in transactions between the husband and wife where her interests are concerned. "I think," said Lord Davey in *Willis* v. *Barron* (1902), A. C. at p. 283, "it is a sound observation that a wife usually has

no solicitor of her own apart from her husband, and I think she is *prima facie* entitled to look to her husband's solicitor —the solicitor of her husband's family—for advice and assistance until that solicitor repudiates the obligation to give such advice, and requires her to consult another gentleman."

That observation seems to apply with peculiar force to a case like this where the solicitor takes upon himself to intervene on behalf of the wife. Mr. Bruce undertook a duty towards Mrs. Stuart, but he left her in a worse position than she would have been if he had not interfered at all. His course was plain. He ought to have endeavoured to advise the wife and to place her position and the consequences of what she was doing fully and plainly before her. Probably, if not certainly, she would have rejected his intervention. And then he ought to have gone to the husband and insisted on the wife being separately advised, and if that was an impossibility owing to the implicit confidence which Mrs. Stuart reposed in her husband, he ought to have retired from the business altogether and told the bank why he did so.

Their Lordships are of opinion that the order of the Supreme Court of Canada is right, though they are unable to concur in the reasons on which that order is founded, and they will humbly advise his Majesty that the appeal should be dismissed with costs.

Bischoff, Dodgson, Coxe, Bompas & Bischoff, solicitors for the appellant.

Blake & Redden, solicitors for the respondents.

IN THE SUPREME COURT OF CANADA.

REX v. ST. CATHARINES HYDRAULIC CO.*

Ex. C.] [NOVEMBER 2ND, 1910.

Lease—Covenant for Renewal—Construction.

A lease for 21 years of mill-races and lands on the old Welland Canal contained the following covenant: "After the end of 21 years, as aforesaid, if the said (lessors) do not continue the lease of the said water and works" they would compensate the lessees for their improvements.

Held, GIROUARD and DUFF, JJ., dissenting, that at the end of the 21 years the lessees were entitled to a renewal of the term but not to a new lease containing a similar covenant for compensation. They had a right to renewal or compensation but not to both.

After the original term expired the lessees remained in possession paying the same rental as before, for a further term of 21 years, no formal lease therefor having been executed and none demanded or tendered for execution. After the expiration of this second term they were dispossessed and claimed compensation for improvements by petition of right.

Held, DAVIES and ANGLIN, JJ., *dubitante*, that the original term of 21 years was continued, or renewed, for a further like term.

Held, per IDINGTON, J., GIROUARD and DUFF, JJ., contra, that the lessees having obtained a renewal their right to compensation was gone.

Per DAVIES and ANGLIN, JJ., the lease was probably not renewed within the meaning of the lessor's covenant, and as there was no proof of a demand for renewal the lessees having remained in possession for the entire period for which they could have claimed a renewal, can have no right to compensation for improvements. If they ever had such

* Readers will substitute this note for that appearing in 30 C. L. T. 1038.

a right in default of obtaining a renewal it is barred by the Statute of Limitations.

Per IDINGTON, J.: The Statute of Limitations would be a bar to the lessees obtaining compensation for improvements made during the original term.

Appeal allowed with costs.

H. H. Dewart, K.C., for appellant.

H. M. Mowat, K.C., for respondents.

IN THE SUPREME COURT OF CANADA.

FINSETH v. RYLEY HOTEL CO.

ALTA.] [NOVEMBER 2ND, 1910.

Appeal — Jurisdiction—Special Leave — "Judicial Proceeding"—Discretionary Order — Matter of Public Interest — Alberta "Liquor License Ordinance," s. 57 — "Originating Summons"—R. S. C. 1906, c. 139, s. 37 —8 Edw. VII. (Alta.), c. 7, ss. 1, 2, 6.

An originating summons issued by a Judge of the Supreme Court of Alberta on an application for cancellation of a license under section 57 of the "Liquor License Ordinance," is a judicial proceeding within the meaning of section 37 of the Supreme Court Act, R. S. C. 1906, c. 139, and consequently, the Supreme Court of Canada has jurisdiction to entertain an application for leave to appeal from the judgment of the Supreme Court of Alberta thereon.

Where the decisions of the Provincial Court shew that the Judges of that Court are equally divided in opinion as to the proper construction of a statute in force in the province and it appears to be desirable in the public interest that the question should be finally settled, it is proper for the Supreme Court of Canada to exercise the discretion vested in it for the granting of special leave to appeal under the provisions of section 37 of the Supreme Court Act. GIROUARD, J., dissented on the ground that the proceedings

in question were intended to be summary and that in these circumstances, the case was not one in which special leave to appeal should be granted.

Motion granted.

Chrysler, K.C., for the application.

Ewart, K.C., contra.

SAWYER & MASSEY CO. v. RITCHIE.

ALTA.] [NOVEMBER 2ND, 1910.

Contract—Implied Warranty—Fitness of Machinery—New Agreement — Breaches Prior to New Contract—Relinquishment of Rights Under Former Agreement.

R. and N. purchased threshing machinery from the company, in November, 1906, under an agreement similar to that in part quoted below, and gave notes for the price. They dissolved their business connection, after using the machine for some time, and, in March, 1907, after the threshing season was over, N. was released from his obligations under the agreement, the notes signed by R. and N. were cancelled, and R. gave the company his own notes in their place and entered into a new agreement containing the following provisions: "The said machinery is sold upon and subject to the following mutual and interdependent conditions, namely: It is warranted to be made of good material and durable with good care and with proper usage and skilful management to do as good work as any of the same size sold in Canada. If the purchasers, after trial, cannot make it satisfy the above warranty, written notice shall within ten days after starting, be given both to the company at Winnipeg and to the agent through whom purchased, stating wherein it fails to satisfy the warranty and reasonable time shall be given the company to remedy the difficulty, the purchasers rendering necessary and friendly assistance together with requisite men and horses; the company reserving the right to replace any defective part or parts; and if the machinery or any part of them cannot be made to satisfy the warranty it is to be returned by the pur-

chaser free of charge to the place where received and another substituted therefor that shall satisfy the warranty or the money and notes immediately returned and this contract cancelled, neither party in such case to have or make any claim against the other. And if both such notices are not given within such time that shall be conclusive evidence that said machinery is as warranted under this agreement and that the machinery is satisfactory to the purchasers. If the company shall at purchaser's request render assistance of any kind in operating said machinery or any part thereof or in remedying any defects such assistance shall in no case be deemed a waiver of any term or provision of this agreement or excuse for any failure of the purchasers to fully keep and perform the conditions of this warranty. When at the request of the purchasers a man is sent to operate the above machinery which is found to have been carelessly or improperly handled said company putting the same in working order again the expenses incurred by the company shall be paid by said purchasers. This warranty does not apply to second-hand machinery. It is also agreed that the purchasers will employ competent men to operate said machinery. There are no other warranties or guarantees, promises or agreements than those contained herein. All warranties are to be inoperative and void in case the machinery is not settled for when delivered, or if the printed language of the above warranty is changed whether by addition, erasure or waiver or if the purchasers shall in any respect have failed to comply herewith."

Some defects in the machinery had given rise to complaints, during the previous threshing season, and had been rectified by the company before the execution of the second agreement; they also made further repairs during the autumn of 1907, and then notified R. that future repairs must be at his own expense. R. paid the first instalment of the price of the machinery, but, when subsequently sued on his other notes, contested the claim, pleaded breach of an implied warranty of fitness and counterclaim for damages for this breach.

Held, that all claims for damages for breaches of any kind prior to the second agreement had been waived by that agreement, and that the provision that there were no other warranties, guarantees, promises or agreements than those contained in the agreement excluded all implied warranties.

Held, further, that the condition requiring written notice of breach of warranty applied only to the warranty that "with proper usage and skilful management" the machinery would "do as good work as any of the same size sold in Canada," and that it had no application to the warranties that the machinery was "made of good materials" and would be "durable with good care."

The consideration for the release of N. and the acceptance of the sole liability of R. for the price of the machinery was the execution of the new notes and agreement which involved the relinquishment by both parties of all their rights under the first agreement.

Appeal allowed with costs.

Bennett, K.C., for appellants.

Chrysler, K.C., for respondent.

MAN.] [NOVEMBER 2ND, 1910.

LONGMORE v. McARTHUR.

Negligence—Dangerous Works—Joint Tort-feasors—Judgment against one of Several Persons Responsible for Damages—Bar to Action.

A proprietor or principal contractor undertaking works in the circumstances inherently dangerous cannot delegate the duty of providing against such danger so as to escape personal responsibility if that duty be neglected.

Failure to discharge such duty makes the proprietor and his contractor, or the contractor and his sub-contractor, as the case may be, equally liable as joint tort-feasors for resultant injury.

A judgment for damages sustained in consequence of any such injury against one of such joint tort-feasors is a bar to a subsequent action therefor against another.

Judgment appealed from (19 Man. R. 641), affirmed.

Appeal dismissed with costs.

A. C. Galt, K.C., for appellant.

Ewart, K.C., for respondents

MAN.] [NOVEMBER 2ND, 1910.

DOMINION FISH CO. v. ISBISTER.

Appeal — Concurrent Findings of Fact — Negligence — Shipping — Action for Damages — Personal Injury — Evidence—Res ipsa loquitur—Limitation of Liability— "Canada Shipping Act," R. S. C. 1906, c. 113, s. 921.

Concurrent findings on questions of fact in the Courts below ought not to be disturbed on appeal unless a mistake is clearly shewn.

A ship lying at her dock caught fire during the night and was destroyed. The officers of the ship failed to arouse passengers in time to permit them to escape in safety, and, in an action to recover damages for injuries sustained in consequence by a passenger, the owners adduced no evidence to explain the origin of the fire.

Held, affirming the judgment appealed from (19 Man. R. 430), that, in the circumstances, the only inference to be drawn was that the owners were grossly negligent.

In such an action the owners of the ship cannot invoke the limitation provided by section 921 of the "Canada Shipping Act," R. S. C. 1906, c. 113, *The "Orwell"* (13 P. D. 80), and *Roche* v. *London and South Western Railway Co.* ((1889), 2 Q. B. 502), referred to.

Appeal dismissed with costs.

R. G. Affleck, for appellants.

Henry F. Blackwood, for respondent.

QUE.] [NOVEMBER 21ST, 1910.

SHAWINIGAN HYDRO-ELECTRIC CO. v. SHAWINIGAN WATER AND POWER CO.

Appeal — Jurisdiction — Matter in Controversy — Stare Decisis — Municipal By-law — Injunction—Contract — Collateral Effect of Judgment—Construction of Statute —Supreme Court Act, R. S. C. 1906, c. 139, ss. 36, 39 (e), 46.

The action was brought by the respondents and other ratepayers of the town of Shawinigan, against the town and

the hydro-electric company, to set aside a by-law of the town corporation authorizing the purchase of certain lands with an electric power-house and plant from the hydro-electric company for $40,750, and for an injunction prohibiting the carrying into effect of the contract of sale. The final judgment in the Superior Court dissolved the injunction and dismissed the action, but on appeal by the plaintiffs the Court of King's Bench maintained the action and made the injunction permanent. On a motion to quash an appeal by the hydro-electric company to the Supreme Court of Canada,

Held, per FITZPATRICK, C.J., and GIROUARD, J., that the Supreme Court was competent to entertain the appeal under the provisions of section 39 (e) of the Supreme Court Act. *The Bell Telephone Co.* v. *City of Quebec* (20 Can. S. C. R. 230), disapproved.

Per DUFF and ANGLIN, JJ.—Semble, that the decision in *The Bell Telephone Co.* v. *City of Quebec* (20 Can. S. C. R. 230), is binding authority on the Supreme Court of Canada.

Per IDINGTON, DUFF and ANGLIN, JJ., (DAVIES, J., contra).—That as the appeal was from the final judgment of the highest Court of final resort in the province of Quebec in an action instituted in a Court of superior jurisdiction for the purpose of preventing the consummation of a contract for a consideration exceeding $2,000, the Supreme Court of Canada was competent to entertain the appeal under sections 36 and 46 of the Supreme Court Act.

Per DAVIES, J. (dissenting):—That the controversy related merely to the validity of the by-law and did not involve the sum or value of $2,000, that the collateral or incidental effects of the judgment were not in question on the appeal, and that, therefore, the Supreme Court of Canada was not competent to entertain the appeal. *The Bell Telephone Co.* v. *City of Quebec* (20 Can. S. C. R. 230), followed.

Motion dismissed with costs.

Holden, for the motion.

Aimé Geoffrion, K.C., contra.

COMMUNICATIONS TO THE EDITOR.

Lunenburg, December 12th, 1910.

Cashon v. *Kaulbach et al.*

Dear Sir,—I have looked at your report of *Cashon* v. *Kaulbach* in vol. 30 of THE CANADIAN LAW TIMES for October, 1910, at p. 837. This case is incorrectly reported, inasmuch as it states that "the defendant instructed a solicitor to apply to the plaintiff, who was living in another town in the constituency, for a loan of $1,800, offering his promissory note, with the name of a third party as endorser, as security for the repayment of the loan. The plaintiff advanced the money to the defendant's solicitor, receiving the promissory note of the defendant, so endorsed, as security." The facts are that a section of the riding, called New Dublin township, desired to raise the sum of $1,800 for their section, which its committee failed to do and solicited the money from Lunenburg and L., a solicitor, approached the plaintiff, at the request of the Bridgewater committee, to advance the sum of $1,800 for the election. L. came to the defendants informing them that the plaintiff would advance the amount on their joint promissory note The note was taken by L. to the plaintiff and the plaintiff paid the money to R. a member of the election committee at Bridgewater, who gave his receipt to the plaintiff for the $1,800 reciting that it was for New Dublin Township Election Fund, 4th November, 1904. A letter of witness S. states that he was present when representations were made to the plaintiff to get the money for this election fund, and that it would be paid, in the usual way, after the election. The statements in this letter were repudiated by S.

The defence pleaded (1) That there was no consideration moving from the plaintiff to the defendants for the making of said note. (2) That the plaintiff had knowledge and was aware of the circumstances for which the note was given, relying on section 279 of R. S. C. 1906, chapter 6. The defendants offered no evidence with regard to the illegal expenditure of the money.

Yours truly,

R. C. S. KAULBACH.

The Canadian Law Times.

VOL. XXXI. MARCH, 1911. No. 3.

INJUNCTION IN CASE OF TRESPASS.

It was an old rule in Equity, that waste was enjoinable for substantial injury to the inheritance done by one, having a limited estate either of freehold or for years, during the continuance of his estate. The interference by way of injunction to protect proprietary rights was justified on the ground of the privity of title between the parties. This old rule was relaxed in the early part of the nineteenth century. Lord Chancellor Thurlow, with great reluctance, extended interference by way of injunction to destructive trespass. The ground upon which the extraordinary power of the Court was invoked, in case of trespass, was the great and irreparable loss and destructive injury its refusal might entail upon the legal rights of the owner of the realty.

In 1801, in the case of *Mitchell* v. *Dors*, 6 Vesey, Jr., p. 147, in which defendant in working a coal mine trespassed upon and proceeded to work upon that of the defendant, on an application for an injunction, Lord Chancellor Eldon, said: "This is trespass, not waste. But I will grant the injunction upon the authority of a case before Lord Thurlow." The case referred to was one in which a landlord of two closes had let one to a tenant, who took coal out of that close, and extending his operations, proceeded to take coal out of the one not demised. The question turned upon, whether the injunction should go as to both. The Lord Chancellor ordered it to go to both. From this time forward the distinction between waste and trespass was disregarded in applications of the like kind. In 1811, in the case of *Thomas* v. *Oakley*, 18 Vesey, Jr., at page 186, Lord Chancellor Eldon, on an application for an injunction in trespass, remarked: "Throughout Lord Hardwicke's time,

and down to that of Lord Thurlow, the distinction between waste and trespass was acknowledged; and I have frequently alluded to the case, upon which Lord Thurlow first hesitated, a person having a close demised to him, began to get coal there, but continued to work under the contiguous close, belonging to another person, and it was held that the former, as waste, would be restrained, but as to the close, which was not demised to him, it was a mere trespass, and the Court did not interfere; but I take it, that Lord Thurlow changed his opinion upon that, holding that, if the defendant was taking the substance of the inheritance, the liberty of bringing an action was not all the relief, to which in equity he was entitled. The interference of the Court is to prevent your removing that which is his estate. Upon that principle Lord Thurlow granted the injunction as to both. That has since been repeatedly followed, and whether it was trespass under the colour of another's right actually existing, or not."

In the earlier cases the rigour of the rule was relaxed only in cases where the trespass was irreparable or destructive to the inheritance. For ordinary naked trespass the Court refused to interfere. After the departure from the old rule, the tendency continued to break down the distinction that had hitherto existed between waste and trespass. Vice-Chancellor Kindersley, in delivering judgment in *Lowndes* v. *Bettle*, 33 L. J., ch. page 453 (1864), referring to the unsatisfactory state of the law, said: "The difficulty arises (in part, no doubt) from the very considerable change which has taken place in the views of this Court on the subject of granting injunctions to restrain injury to property, and from the fact that the Court will now do what in the time of Lord Thurlow, and the earlier days of Lord Eldon, it would not have done. Lord Eldon, in the earlier part of his time, alluded to the change even then in progress, and to the facility in granting injunctions as being even then greater than in former times. The other Judges subsequently advert to the continuous modifications, which in some degree also, and not unnaturally, accounts for the conflict of authrities that now exists." The following principles are deducible from the judgment by Vice-Chancellor Kindersley in the case referred to, "Where a defendant is in possession of an estate and a plaintiff claiming possession of it seeks to restrain him from cutting down trees and digging sods, and other such like acts, the Court will not interfere, unless the acts

complained of amount to such flagrant instances of spoliation as to justify the Court in departing from the general rule.

"Where a plaintiff is in possession and the person doing the acts complained of is an utter stranger, not claiming under colour of right, then the tendency of the Court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law; though if the acts tend to the destruction of the inheritance, the Court will grant an injunction.

"But where a plaintiff in possession seeks to restrain one who claims by an adverse title, the tendency of the Court will be to grant an injunction, at least when the acts committed do or may tend to the destruction of the estate.

"Where, therefore, a person, not being in possession of an estate, claimed it as heir-at-law, and entered upon it, cut down trees, and cut sods, and threatened to repeat his conduct in order to establish his alleged title as against the possessor, who by himself and his ancestors had been in possession of the estate for upwards of eighty years, it was held, upon bill filed by the possessor against the claimant that as the acts of the defendant might be injurious to the inheritance, he must be restrained by the injunction of the Court from committing them."

Nine years after the delivery of the judgment of Vice-Chancellor Kindersley, in *Lowndes* v. *Bettle,* the power of the Court of Chancery to grant injunctions was greatly extended by the Judicature Act of 1873, 36 & 37 Victoria. Under sec. 25, sub-sec. 8 (English Act) it is provided an injunction may be granted unconditionally or upon such terms and conditions as the Court shall think just or convenient that such order should be made, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass. And such an injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or, if out of possession, does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estate claimed by both or by either of the parties are legal or equitable.

Of course the granting of an injunction is not intended to influence the final decision of the legality or otherwise of

the act complained of. The interlocutory injunction is simply intended to preserve matters in *statu quo* until the final hearing determines in whose favour the decree should be made. The jurisdiction to be exercised by the Judge is discretionary, and yet his decision should be based upon settled legal principles. It was held in *Harris* v. *Beauchamp* (1894), 1 Q. B. 801, at page 809, that the words "just or convenient" do not in any way confer an arbitrary or unregulated discretion on the Court. To entitle the applicant to an interlocutory injunction a strong *prima facie* case must be made out, and such as, unless the evidence is borne down adversely, will in all probability secure a favourable judgment. The following rules have been held as safe guides in regulating the exercise of the discretionary power of the Court or a Judge. It should be exercised favourably, to prevent the threatened infringement of a legal or equitable right, which, if not enjoined, would afford a ground of action.

It may be invoked to enjoin a continuous trespass. It should not be granted, if the injury could be amply compensated by damages.

Likewise, if it would be impossible to comply with the order.

Also, if the Court could not enforce its order effectively.

Or, if the plaintiff has acquiesced in the infringement of his right.

Or, has delayed, if an equitable right, an unreasonable length of time in applying for relief.

By the provisions of Lord Cairns' Act, 21 & 22 Vict. ch. 27, sec. 2, discretionary jurisdiction was conferred upon the Court of Chancery, in all cases in which it had power to grant an injunction to award damages either in addition to or in substitution for such injunction." This jurisdiction is still retained by 46 & 47 Vict. ch. 49, sec. 5 As to awarding damages instead of granting injunctions, see judgment of Lord Macnaghten and Lord Lindley in *Calls* v. *Home & Colonial Stores* (1904), A. C. pp. 193-212.

If the trespass is a continuing one, or is threatened to be repeated, though not of a continuing nature, the Court will interfere by injunction, especially since the Judicature Act of 1873. Lord Justice Lopes, in delivering his judgment in *Harrison* v. *Duke of Rutland*, L. R. (1893), 1 Q. B. D. at page 154, says: "Sir H. James, on the part of the Duke,

does not press for an injunction; if he had I should have thought it ought to be granted. . . . This, I think, he ought to have. An injunction is constantly granted by the Queen's Bench Division for trespasses threatened to be repeated. It is the effect of the Judicature Act, and a most wholesome remedy."

To the like effect is the case of *Hickman* v. *Maisey* (1900), L. R. 1 Q. B. D. p. 752. This was an action of trespass brought under the following circumstances. A highway crossed the plaintiff's land, and the defendant, who was what is called a "racing tout," had for a considerable period of time been using this highway for the purpose of watching therefrom the trials of race-horses upon the plaintiff's land, and availing himself of the information so obtained by him for the purposes of his business, the effect of which was to depreciate the value of plaintiff's land as a place for the training and trial of race-horses. The defendant insisted on his right to use the highway, and the plaintiff brought his action for trespass in respect of such a use of the highway by the defendant. The defendant justified the acts complained of on the ground that the *locus in quo* was a highway, and that he was lawfully using it as such. The jury found a verdict for the plaintiff, and the learned Judge gave judgment accordingly and granted an injunction. The Court of Appeal held the defendant had exceeded the ordinary and reasonable uses of a highway as such to which the public are entitled, and he was therefore guilty of trespass on the plaintiff's land and the injunction was rightly granted. In certain cases a repetition of the offence may be inferred. This was so held in the case of *Dunlop Pneumatic Tire Company* v. *Neal* (1899), L. R. 1 Ch. Division, p. 807, in which plaintiffs applied for an injunction to restrain the defendant from infringing a patent. It was held, that, though only the one act of infringement by the defendant was proved, and there was no evidence of any threat by him to infringe again, yet, as he had accepted the order in the ordinary course of business, it must be assumed that he would accept similar orders again, if they were offered to him, and, consequently, he must be restrained by injunction from infringing the patent. North, J., in delivering judgment, said: "When a man employed in the way of his trade accepts an order, and then comes here and asserts that he had a right to do what he did, this shews that he would do

the same thing again if anyone else should come to him on a future occasion and give a similar order. Under these circumstances I think the plaintiffs are entitled to an injunction in the terms of the notice of motion."

Since an injunction is a formidable weapon, in order to prevent an oppressive use of such a remedy, Courts move with great care in its exercise. They require the utmost good faith on the part of the plaintiff and scrutinise with vigilance the motives prompting him who invokes its aid. An *ex parte* application for an injunction must be supported by affidavit or affidavits explicitly and fully stating the facts within the knowledge of the deponent or deponents. There must be neither misrepresentation nor concealment. Every material fact should be set forth with precision and accuracy. They should as exactly as possible fix the time when the injury or threatened injury first became apparent. Statements based on information and belief are admissible, but the name of the individual or source whence the information was received must be stated.

Instead of issuing an injunction, the Court often grants an interim order, by which the defendant is restrained until after a particular day named, or until the hearing of the cause, or until a time thereafter to be named, or "until further order."

By the Judicature Act, 1873, sec. 25, sub-sec. 8, the Courts are clothed with power to issue injunctions, whether prohibitory or mandatory, interlocutory or perpetual, when ever "it shall appear to the Court to be just or convenient that such order should be made."

"Just or convenient" are words that have often proved a stumbling block to the Court. Being a matter of discretion no hard or fast rules can be laid down on the point. Each case must be decided largely upon its own circumstances. However, it has been said, two matters will be taken into consideration by the Court, namely:

First: the magnitude of the injury complained of.

Second: the conduct of the parties.

In *Shelfer* v. *City of London Electric Lighting Company* (1895), L. R. 1 Ch. p. 287, Lord Justice A. L. Smith, at page 322, lays down the following rules, when damage may be awarded in substitution for an injunction.

(1) If the injury to the plaintiff's rights is small.

(2) And is one which is capable of being estimated in money.

(3) And is one which can be adequately compensated by a small money payment.

(4) And the case is one in which it would be oppressive to the defendant to grant an injunction—then damages in substitution for an injunction may be given.

The principle to guide the justice in such a case is tersely expressed by Lord Jessel, Master of the Rolls, in *Beddow* v. *Beddow* (1872), L. R. 9 Ch. Div. at page 93. After referring to the Common Law Procedure Act, 1854, His Lordship proceeds: "Now, I rely upon these provisions, because they seem to me to explain the 25th section, subsection 8 of the Judicature Act, 1873, which says, "a mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient." If this can be done by interlocutory application *a fortiori* it can be done at the trial of the action, on the principle of *omne majus continet in se minus*." Next, by the Common Law Procedure Act this power would have been exercised at the trial as far as it was "just." The only addition is that in the Judicature Act you have "just or convenient," not that it would be convenient which was unjust; but that in ascertaining what is "just" you must have regard to what is "convenient." All acts, therefore, which a Common Law Court or a Court of Equity only could formerly restrain by injunction can now be restrained by the High Court. That being so, it appears to me that the only limit to my power of granting an injunction is whether I can properly do so. For that is what it amounts to. In my opinion, having regard to these two Acts of Parliament, I have unlimited power to grant an injunction in any case where it would be right or just to do so: and what is right or just must be decided, not by the caprice of the Judge, but according to sufficient legal reasons or on settled legal principles." Lord Justice Davey, in *Harris* v. *Beauchamp* (1894), 1 Q. B. p. 809, thus defines the limits of discretion to be exercised by the Court in the following concise terms: "These well-known words do not confer an arbitrary or unfettered discretion on the Court, and do not authorize the Court to invent new modes of enforcing judgments in substitution for the ordinary modes."

So it would seem the words "just or convenient" do not give the Court unlimited power of issuing an injunction to enforce legal or proprietary rights. The discretion indicated is circumscribed by well defined legal principles.

In a New Brunswick case, *Miller* v. *Robertson* (1904), 35 S. C. R. page 80, by a divided Court, it was held, the Chief Justice and Mr. Justice Sedgewick dissenting, that the Court of Equity will not grant a decree confirming the title to land claimed by possession under the Statute of Limitations nor restrain by injunction a person from selling land of another. Nesbitt, J., in delivering judgment, said: "A sale of the land of the true owner as the property of a mere stranger with whom he is not connected, from whom he does not mediately or immediately trace title cannot cast a cloud on his title." This remark, it seems, was meant to apply to the case of an unregistered instrument, for in this connection the learned justice cites the following extract from the judgment of Sir Henry Strong, then Vice-Chancellor, in *Truesdale* v. *Cook*, 18 Gr. p. 522: "I am of opinion that in a proper case where the plaintiff having a legal title has done all he can to assert his title at law, a bill may be maintained in this Court to compel the delivering up of a deed which appears to be void at law, provided it is a registered instrument. I find no authority for saying that the existence of an unregistered deed passing no interest, and not appearing to be a link in the title, can give ground for the jurisdiction; but the registration has such a tendency to embarrass the title of the true owner that there would be a great want of remedy if this Court could not decree cancellation in such a case." It should be borne in mind, however, that New Brunswick had no Judicature Act, at the time *Miller* v. *Robertson* was decided.

In a recent case, *Cope* v. *Sharpe* (1910), L. R. 1 K B. p. 168, the circumstances were peculiar and raised a question of some difficulty which is well worth considering. The plaintiff was the owner of land in Hampshire. The defendant was the game keeper of one to whom the plaintiff had let the shooting on the land in question. A fire broke out on this land. The defendant came on the land and set fire to certain strips of heather to the leeward of the approaching conflagration, in order to check the fire when it reached the places where the strips of heather had already been burnt down by him. The plaintiff brought an action of trespass

for setting fire to the strips of heather, and for an injunction. The Court gave judgment for the plaintiff for 5s. damages, and for an injunction to restrain the defendant from lighting any more fires on the plaintiff's lands. On appeal, a new trial was ordered. Darling, J., in the course of his judgment, remarked, although the trial Judge decided against the defendant, he "appears to have assumed that he might have been entitled to put out the fire by throwing water on it or by stamping on the burning heather; but these acts would in law constitute a trespass, just as much as what the defendant in fact did, unless they could be justified by the defendant. What the defendant did was to burn the heather on one portion of the land solely with the object of preserving it in another part, and in my opinion the question whether the defendant was entitled to burn the heather which he did burn depends on whether it was necessary to do so in order to preserve the enjoyment of the rights over the land which had been granted by the plaintiff to his employer. If the defendant's act was necessary for that purpose, I think he committed no trespass; if it was not necessary he did commit a trespass. I cannot find in the judgment of the County Court Judge anything to shew that he ever addressed his mind to this question, and as he has not found the facts necessary for the determination of the question, there must be a new trial."

Summary.

The following summary of the dicta of the Judges and the principles established by the decisions of the Courts, in the cases above referred to, cannot be too carefully borne in mind:

1. An injunction is a formidable legal weapon which the Court will refuse to employ when the injury complained of is trivial.

2. The very first principle of injunction law is that *prima facie* you do not obtain injunctions to restrain actionable wrongs for which damages are the proper remedy. Dictum L. J., Lindley, in *London and Blackwall Railway Co.* v. *Cross*, L. R. (1886), 31 Ch. D. at page 369.

3. Upon an *ex parte* application for an injunction the facts should be fully and accurately disclosed—neither suppressing anything, if material, nor unduly magnifying anything, if favourable.

4. A mandatory injunction is only granted in cases where the injury cannot be sufficiently compensated by damages. In *Kine* v. *Jolly*, L. R. (1905), 1 Ch. D. at page 504, L. J. Cozens-Hardy says: I think it is impossible to doubt that the tendency of the speeches in the House of Lords in *Colls* v. *Home and Colonial Stores* (1904 A. C. 179), is to go a little further than was done in *Shelfer* v. *City of London Electric Lighting Co.* (1895), 1 Ch. D. p. 321, and to indicate that, as a general rule, the Court ought to be less free in granting mandatory injunctions than it was in years gone by."

5. An injunction is granted in aid of a legal right when the defendant threatens to do some act, which, if done, will violate a legal right of the plaintiff, especially if the defendant sets up the claim of a right to do the act in question. When there is some doubt as to the legal right or a question as to its infringement, and serious injury is not likely to result, yet an injunction may still be granted, if the balance of convenience is in favour of it, but not otherwise. An injunction will usually be granted to restrain the continuance or a repetition of a trespass. See *Hickman* v. *Maisey*, L. R. 1900, 1 Q. B. p. 752. In the exercise of its discretionary jurisdiction the Court will regard the balance of convenience and inconvenience in granting or refusing an interlocutory injunction.

6. An interlocutory injunction will only be granted when the plaintiff has made out a *prima facie* case, so that it is probable, if the evidence remain as it is, that at the hearing of the action he will get a decree in his favour. See *Challender* v. *Royle* (1887), 36 Ch. D. at p. 436.

7. The Court will not make an order to restrain an act unless it is satisfied that some means exist whereby the party restrained can prevent the act from taking place. The Court will not make an order that a thing shall be done or not be done, when the only effect of the order will be the not doing or the doing of the thing, but the imprisonment of the person against whom the order is made. *Lex non cogit impossibilia.* See *Attorney-General* v. *Guardians of Poor of Union of Dorking* (1882), 20 Ch. D. p. 595 In this case, Jessel, M.R., at p. 606, said: "You are not to send a man to prison for not preventing that which he cannot prevent. . . . You cannot make an order to do a thing which is impossible. . . . Before you can make an order

directing a man to do something, for that is the effect of the injunction, you must be satisfied that he can do it."

8. The jurisdiction to grant a mandatory injunction is exercised with extreme caution, and only in cases where the injury, although infringing a legal right, could not be adequately compensated by damages.

9. On an interlocutory application for an injunction a deponent may make a statement as to information and belief, but the grounds thereof must be given to render it admissible. In *Quartz Hill Co.* v. *Beall,* L. R. 20 Ch. Div p. 501, Jessel, M.R., in his judgment on appeal from a decision of Vice-Chancellor Bacon granting an injunction upon interlocutory application to restrain the publication of a libel, at page 508, says: "Where an affidavit is made upon information and belief the rules of the Court require that the deponent should state what are the grounds of his information and belief, and that, he (in this case) does not do, he only says that they are untrue to the best of his knowledge, information and belief, not saying what the best of his knowledge is, and it may be nothing at all. There is, therefore, no evidence as to the untruth of the allegations in the circular. And, on the other hand, the defendant has pledged his oath that he verily believes they are untrue. In this state of the evidence I am of the opinion that no injunction ought to have been granted." In this connection the words of Lord Chief Justice Alverstone are significant. In *Young* v. *The Young Manufacturing Co.,* L. R. (1900), 2 Ch. Div. at p. 754, his Lordship said: "This case is one of general importance as regards the practice of the admissibility of evidence by affidavit. In my opinion some of the affidavits in this case are wholly worthless and not to be relied upon. I notice that in several instances the deponents make statements on their "information and belief" without saying what their source of information and belief is, and in many respects what they so state is not confirmed in any way. In my opinion, so-called evidence on "information and belief" ought not to be looked at at all, not only unless the Court can ascertain the source of the information and belief, but also unless the deponent's statement is corroborated by someone who speaks from his own knowledge. If such affidavits are made in future, it is as well that it should be understood that they are worthless and ought not to be received as evidence in any shape whatever; and as soon as affidavits

are drawn so as to avoid matters that are not evidence, the better it will be for the administration of justice."

These remarks of the Lord Chief Justice were supplemented by Lord Justice Rigby, at a subsequent page of the same judgment, in language no less emphatic. His Lordship said: "I frequently find affidavits stuffed with irregular matter of this sort. I have protested against the practice again and again, but no alteration takes place. The truth is that the drawer of the affidavit thinks he can obtain some improper advantage by putting in a statement on information and belief, and he rests his case upon that. I never pay the slightest attention myself to affidavits of that kind, whether they be used on interlocutory applications or on final ones, because the rule is perfectly general—that, when a deponent makes a statement on his information and belief, he must state the ground of that information and belief."

The objectionable part must be on a point material and essential to the issue raised, or one which finally decides the rights of the parties. If not defective to this extent, there being sufficient in the rest of the affidavit, or in affidavits of other parties, to sustain the charge, the defect indicated will not necessarily prove fatal to the application.

10. In case of an expected trespass, on application for an injunction, it is material to allege, that the defendant threatened and intended to trespass upon the land in question. Such intention may be inferred from the nature of the case and the acts of the defendant. See *Stannard* v. *Vestry of St. Giles*, L. R. 20 Ch. D. p. 190.

Greater care is expected on the part of the pleader, in cases where an application for an injunction may be asked for, than in the ordinary course of practice.

Sound Advice in Drawing Pleadings.

The following remarks on Pleading, taken from the last edition of Odgers on Pleading and Practice, are worthy of careful consideration:

The first essential of good pleading is—to be clear. The next is—to be brief. The necessity of brevity cannot be too emphatically insisted upon. Notwithstanding, pleadings should be concise, they should, however, be precise.

Material facts should be set forth briefly and succinctly and in strict chronological order. Use terse, short, curt,

blunt sentences, all in the indicative mood. Be positive. Do not beat about the bush. Go straight to the point. If you mean to allege a particular fact, state it boldly, plainly, clearly and concisely. Avoid all "ifs," and all introductory averments. Avoid all periphrasis, all circumlocution. A pleading is not the place for fine writing, but simply for hard, downright, business-like assertion.

The pleader must decide for himself how far it is necessary for him to set out items and to go into figures; how far details of time and place and other surrounding circumstances are necessary to make his pleading intelligible and precise. Experience will teach him this; even common sense without experience will help him much; for our law is rapidly degenerating into common sense.

Perhaps the best test is this: After you have drafted your pleading, banish your instructions from your mind for a moment, and imagine yourself a stranger coming fresh to the matter. Would your draft, read by itself, convey to his mind a clear conception of your client's case? If not, you must make your draft more definite; and this object will often be best attained by omitting half of it. Length does not conduce to perspicuity. Half a dozen neat, short sentences, each clear in itself, will tell your story best.

SILAS ALWARD.

St. John, N.B.

SOME PROBLEMS OF FEDERAL GOVERNMENT.

In several recent public utterances[1] Sir James Whitney, the Premier of Ontario, has touched upon certain phases of the relations between the local Provincial Governments and the Federal Government of the Dominion in such a way as to raise interesting questions upon the development of our federal system in Canada. Sir James pleaded for a measure of power for the provinces in important subjects and foreshadowed an effort on the part of the provinces to secure the right to maintain a direct connection with the Imperial Government through the agency of a commissioner representing the province, instead of, as at present, being represented by the High Commissioner for Canada. He instanced the difference between the status of the provinces of Canada in this respect and that of the States of the Australian Commonwealth. He complimented Hon. Mr. Aylesworth for the stand taken by him on the constitutional question involved in certain recent petitions to disallow enactments of the Ontario Legislature, and declared the independence of the provinces from interference by the Dominion in matters within the sphere of provincial jurisdiction.

The remarks of the provincial Premier, whether generally concurred in or not, certainly give expression to a well marked tendency of constitutional development in Canada during the period since Confederation, and give occasion for some comparisons between our federal system and the systems of the other two great federations of the British Empire.

Every example of Federal Government represents a compromise between two opposing desires or principles. On the one hand there is the desire for unity and uniformity of administration which manifests itself in the bringing and holding together of the various local units under a central government. On the other hand there is the desire to secure and maintain the independence of local institutions free from the interference of the central Government or the more distant constituents of the union. Between these two principles a working compromise is set up by dividing the

[1] At Berlin, 11th October, 1910, and at London, 14th December, 1910.

field of political activity into two parts, one of which, consisting of matters in respect of which the necessity of co-operation or other considerations of expediency demand a common administration, is committed to the central government, while on the other part, consisting of matters which may be conveniently dealt with from a local standpoint is divided amongst the local constituents.

It is natural that the views of those engaged in the working out of a federal constitution should be coloured according as their disposition or their circumstances incline them to the advocacy of one or the other of these two aspects of federalism. Accordingly there are political parties identified respectively with the upholding of "federal rights" or "state rights" or "provincial rights" as the case may be The two great political parties in the United States to-day still stand largely as exponents of the centripetal and centrifugal tendencies respectively as represented in the federal system of the United States. In Canadian politics the division of authority as between central and local governments has not been so prominent an issue; though a marked feature of the policy of the late Sir Oliver Mowat was the assertion of the principle of local autonomy or "provincial rights;" and it is safe to say that in the advocacy of the union of the different colonies of British North America the Conservative party was more active than the Liberal, and that the advocates of a legislative, as distinguished from a federal union, were also found chiefly amongst the members of the Conservative party.

It is, perhaps, needless to observe, that the advocacy of one or the other of these principles is frequently prompted by the exigencies of immediate political situations rather than by a consideration of the larger ultimate advantages to accrue from the application of the principle. There is a touch of this human element in the fact that the present Premier of Ontario is the lineal political descendant of the exponents of the centripetal principle in Federal Government The attitude of the Premier, however, apart from its purely local political setting, is illustrative of a tendency in the constitutional development of this country which has manifested itself so gradually as to have attracted little attention from constitutional writers. In 1785 Alexander Hamilton wrote "It will always be far more easy for the State Governments to encroach upon the national authorities than for the

National Government to encroach upon the State authorities. The proof of this proposition turns upon the greater degree of influence which the State Governments, if they administer their affairs with uprightness and prudence, will generally possess over the people; a circumstance which at the same time teaches us that there is an inherent and intrinsic weakness in all federal constitutions, and that too much pains cannot be taken in their organisation, to give them all the force which is compatible with the principles of liberty.[2]

The world was then much younger in federal experience than it is to-day; for while the author of the Federalist could point to a meagre example or two of the working out of the federal idea in the history of ancient Greece, it is now fully realised that the first real exponent of federalism, as understood in modern times, was the United States itself. The history of the United States has borne out the contention of Hamilton that the tendency in Federal Governments is rather to anarchy among the members than to tyranny in the head. The first American Union of 1777 fell into disintegration the moment the binding influence of the revolutionary struggle was removed. The constitution of 1787 stands out as a particularly brilliant example of constructive political genius, but even the genius of Hamilton, Jay and Madison did not avail to prevent the well-nigh fatal flaw which called forth the constitutional struggle culminating in the Civil War.

With the lessons of this bitter conflict immediately before them the framers of the British North America Act set about laying the foundations of a federal structure, that, whatever its deficiencies, should not duplicate the weaknesses of its federal prototype. There are many indications in the Act itself which point to a desire for a closer knit fabric than that of the United States constitution, and it is doubtful if any of the Fathers of Confederation would recognise in the actual working of our federal constitution, after forty years' experience under it, the system which they intended to call into operation. In this connection it is, of course, needless to point out that an examination of the written constitution of Canada as represented by the British North America Act, does not reveal all the important, or even the essential features of our federal system in its actual operation, but that a large portion of our constitutional law consists, as in England, of conventions and practices. It is these con-

[2] The Federalist, No. 17.

ventions and practices, of course, that most readily lend themselves to alteration and adaptation to public sentiment and the exigencies of local situations.

But the inherent centrifugal tendency displayed in federal forms of Government is by no means sanctioned in all cases by the weight of popular opinion, throughout the whole federation, or even by the sound judgment of those who temporarily take advantage of it. The men who at times find it expedient to urge the local as against the general view of a particular constitutional problem would often, if untrammelled by immediate circumstances and dealing with the problem in the abstract, take an opposite view. But the fact that opposing political parties may be in power in the respective Governments, or some other accidental circumstance, frequently constitutes a determining factor. In each successive federal constitution that is called into existence, however, increasing care is being exercised to counteract the decentralizing tendency and to limit the activity of the local Governments.

Provincial Status.

It is true that in the Australian Confederation the States occupy in many respects a more independent position in relation to the central Government than do the provinces of Canada. The Lieutenant-Governors of the States are appointed, not by the Federal Government of the Commonwealth, but by the Imperial Government. Legislative measures, after passing the two legislative chambers of a State and being signed by the Lieutenant-Governor are sent for review, not to the Commonwealth Government, but to the Imperial Government, and the Imperial Government exercises over state laws powers of disallowance corresponding to those which are under the Canadian constitution exercised by the Federal Government at Ottawa. In the Australian federal system an effort has been made to avoid an interdependence of Federal and State Governmental machinery. Following the American model there is a distinct cleavage between State and Federal functions, and two distinct sets of officials for executive and administrative purposes. There are "federal Courts" and "State Courts," federal sheriffs and State sheriffs, a federal militia and a State militia. These

features of the Australian constitution doubtless represent a closer nominal connection between the individual states and the colonial office. But on the other hand the Commonwealth Act gives to the central government control over "external affairs," which is in exact accordance with the basic principles of Federal Government as establishing the unity of the federation in its relation with the foreign jurisdictions. The appointment of lieutenant-governors by the Imperial Government and the retention of the power of disallowance of State legislation in the colonial office may therefore be regarded as more or less accidental.

An Australian writer has remarked upon the feature of the Canadian constitution which establishes the avenue of official communication between the provinces and the Imperial Government through the central Government as represented by the Governor-General and treats it as "a marked departure from the federal type." He claims that the Australian constitution more nearly conforms to the "fundamental dualistic principle of a federal State." It may be that in pursuance of the "dualism" of two sets of Courts and other officials it would be logical to have the Lieutenant-Governors appointed as they are in Australia by the home Government, and to have State legislation subject to revision and disallowance in Downing street. But there is nothing essentially federal in such an arrangement. It is of the very essence of federal system of government that as regards outside countries and jurisdictions the federation is a unit. It is only for local purposes that the State or provincial sub-divisions exist. So far from representing a higher type of federalism than the Canadian, the Australian Commonwealth is, therefore, in reality less completely federated.[3]

The status of the provinces of the Union of South Africa is so different from that of the provinces of Canada or the States of the Australian Commonwealth that it does not afford a fair basis of comparison. In the division of powers the union Government is simply given "full power to make laws for the peace, order and good government of the union." The provinces are given powers over local finance, municipal institutions and other matters of a purely local nature, and "generally all matters which *in the opinion of the Governor-*

[3] Teece, A Comparison of the Federal Constitutions of Canada and Australia, 13.

General-in-Council are of a merely local or private nature." The latter is an important departure in colonial federal policy, and is indicative of the general effect of the Act which is to leave a very large measure of control over the local bodies in the hands of the central Government. The heads of the Provincial Governments are merely "administrators" appointed by and removable by the Governor-General-in-Council. The local legislature is the "provincial council," the constitution of which is in a large measure controlled by the central Government and not left, as under our system, to the province itself. Even the rules of procedure in the provincial councils are subject to the veto of the Governor-General. Provincial bills are sent for assent on behalf of the Crown, not to the head of the provincial Government, but to the Governor-General-in-Council, and have no force unless so assented to.

It will be seen that the South African constitution represents a far more centralized type of federation than that of Australia or Canada; and that the truth of Hamilton's words is being increasingly realised in each successive federal organisation. The example of the Australian Federation when properly examined shews no deviation from the general tendency. The Commonwealth was formed under no such stress of necessity as the constitution of the United States or even that of the Canadian Federation. It was largely spontaneous on the part of the separate colonies of Australia, and each of the colonies had it in its power to balk the whole scheme if its own terms were not acceded to. Under these circumstances it is on the whole rather remarkable to find the degree of unity displayed in the Commonwealth Act. And it is worth noting that within ten years after its adoption it is proposed to amend the constitution so as to place in the central Government the entire control of a number of important matters which in the original Act are left in the hands of the States.

These two colonial federations, therefore, stand in marked contrast to that of Canada, where the truth of Hamilton's words is being effectually illustrated in the gradual increase in the sphere of provincial activity and the gradual assertion by the provinces of an independence of the central Government never contemplated by the framers of our constitution. It has undoubtedly been far more easy for the provincial Governments to encroach

upon the central Government of the Dominion than for the Dominion Government to encroach upon the provincial authorities, and the reason for this has been not only the greater degree of influence which the Provincial Governments have possessed over the people, but the relative strength of individual provinces as compared with the central Government. The United States federation began its career with thirteen constituent local parts. The Canadian Federation had at first only four provinces, and although the number has increased, the relative importance of the individual provinces has not materially altered, and the larger provinces possess much more influence in relation to the Dominion Government than does any State of the American Union in relation to the Federal Government. There are few political cries so potent in creating provincial unpopularity for any Government in power in the Dominion as an allegation of interference with "provincial rights" whether actual or imaginary and as a result constitutional questions are often measured in terms of the gain or loss of votes involved in a single province. This is, perhaps, the most tangible of the causes which have contributed to a decidedly centrifugal development in our constitution during the period since Confederation. Whatever the causes, a comparison of the constitutions of Canada, Australia, South Africa and a consideration of the forces operating in the United States of America affords material for the student of constitutional politics which gains in interest when it is considered along with the movement for "Imperial Federation" and the proposal of a scheme of devolution for the United Kingdom itself; not to speak of the gradual but marked drawing together of the different world powers in such institutions as the Hague Tribunal.

IMPERIAL REPRESENTATION OF PROVINCES.

As to the proposal of the provincial Premier of having agents-general to represent the different provinces in England it is interesting to note the views of the commentators upon the Australian constitution. Thus Messrs. Quick and Garran say: "The Federal Parliament will not have power to abolish the separate agencies-general of each colony, but it will be able to create a new department similar to that of the High Commissioner for Canada, and to authorise the appointment of a High Commissioner for Australia, who

would, in time, necessarily absorb and perform all the important work relating to public finance, trade and commerce, post and cable, naval and military defence, diplomatic representation and inter-communication, now done by the several agents-general. The latter would be denuded of their prestige and most of their duties, and there would be no necessity or justification for the continuance of the old system."[4]

An idea of the scope of the jurisdiction of the Commonwealth Parliament over "external affairs" may be gathered from the definition of the Prime Minister of Australia, who was also the first to hold the portfolio of the "Department of External Affairs" in the Australian cabinet, and who described that department as embracing "immigration and emigration, the influx of criminals, the relations with England, communications with the Governor-General and several States."[5]

In 1903 Mr. Chamberlain wrote to the Government of South Australia "So far as other communities in the Empire or other foreign nations are concerned the people of Australia form one political community for which the Government of the Commonwealth alone can speak, and for everything affecting external states or communities which take place within its boundaries that Government is responsible. The distribution of powers between the Federal and State authorities is a matter of purely internal concern of which no external country or community can take cognizance."[6]

The matter specifically in question in the despatch was the proper medium of communication between the State of South Australia and the Netherlands Government; but the same stand has been subsequently taken by the colonial office in respect to communication with the Imperial Government, and while these expressions are only official and not legal interpretations upon the division of powers in the Australian constitution, and the questions may, therefore, not be conclusively settled, they are strongly indicative of the mind of the Imperial Government both on the interpretation of the Act and the question of policy.

Even under the old American Confederation which gave place to the present American Union in 1789, it was re-

[4] Australian Commonwealth, 633.

[5] Moore, Constitution of the Commonwealth of Australia, 172.

[6] Parliamentary Papers (Commonwealth), No. 18, 1903.

cognised that the individual states should have no right to make treaties with foreign nations, and certainly this would be impossible under the present American constitution. And yet, with due allowance for colonial status, this is what the Premier's proposal involves. It would make Canada in the eyes of England, and for certain purposes, not a colony or dependency (or whatever in these days of colonial maturity may be the proper term), but a series of colonies or dependencies. This was certainly not the conception of framers of the British North America Act nor of the Imperial Parliament in passing it; and it shews how far from the original plan we have drifted that such a proposal should now be made.

Under the constitution of the Union of South Africa there is manifestly no likelihood of any question ever arising as to the proper means of communication between the provincial Governments and the Imperial Government. The highly centralised character of the federal structure of the Union would seem to negative any direct connection between the provinces and the home Government, and if any question should arise it would be within the power of the central Government to determine whether the matter were properly within the provincial sphere.

It may be that difficult situations will arise owing to the want of jurisdiction in the central Government over some subjects with regard to which it is desirable to make treaties. It is apparently now within the range of probability that the Dominion will be given the right in certain matters to enter into agreements with other jurisdictions without the intervention of the Imperial Government. And it may give rise to difficulty that the Dominion would not have the right to conclude such a treaty, for instance, as that made between England and France a few weeks ago on the subject of workmen's compensation. Similar difficulties have faced the Federal Government of the United States on numerous occasions, and have been a source of embarrassment. But they are difficulties inherent in the federal system of government and the complications would be infinitely enhanced if each province or state were able to make its own agreements with each foreign jurisdiction in respect to the subjects within the local sphere. The same reasoning applies *pro tanto* to the relations between the provinces and the Imperial Government, and it would undoubtedly give rise to embarrassment if in

addition to the High Commissioner the Imperial Government were obliged to deal with the representatives of the nine different provinces of Canada, and to distinguish between the scope of their authority and that of the High Commissioner.

A.

Toronto, February 1st, 1911.

THE MEDICAL MAN AS A WITNESS.*

A Court is organised and sustained to enforce the law; the law is composed of such rules of conduct as the community think it worth while to endeavour to compel obedience to—whether these rules of conduct come down from the forefathers or are prescribed by contemporary authority. The law is made effective by various sanctions, so that the violator shall pay in "meal or malt," in person or pocket.

A Court may be called upon but to determine the law; that is, it may be that there is no dispute as to the facts and the sole question is, "granted that the facts are so, what rights does the law give to the contending parties?" But this is a rare occurrence in any Court at which a medical man is likely to appear: the cases are by far more numerous in which the real dispute is "what are the facts?" not "what is the law?"—while most cases are contested both on the law and the facts.

It is the latter controversy only, i.e., on facts, in which the witness plays any part.

In our system questions of law are for the Judge alone; and with them the jury has nothing to do.

Questions of fact are determined either by a Judge or by a jury. In certain classes of cases these questions must be determined by a Judge unless the Judge directs them to be brought before the jury—in certain other classes they must be determined by a jury if either party desires it—in most cases the determination may be by Judge or jury. In this last-mentioned class, if either party wishes a jury,

*Extracts from an address by Hon. Mr. Justice Riddell, before the Academy of Medicine, at Toronto, Nov. 8th, 1910.

he serves a jury notice; but even then, the Judge has the power of dispensing with a jury and trying the facts himself. Perhaps most civil cases are now tried without a jury by a Judge alone. In the High Court and at the Sessions, criminal cases are tried by a jury. But whether civil or criminal, and whether tried by Judge or jury, the rules are the same.

Certain matters need not be proved, e.g., matters of common knowledge, that the week is seven days, the ordinary year, 365 days—that water runs down hill and smoke ascends—that persons driving when they meet should turn out to the right—and, generally, things everyone ought to know. The Judge, too, takes judicial cognizance of the facts of mathematical and natural science and of the laws he is administering.

Outside of such matters and the like, at the present time the jury (I use this word to indicate not only the jury proper but also the Judge sitting to try facts as a jury) must find the facts from the evidence. Centuries ago this was not so; jurors then were taken from the neighbourhood of the locus of the facts to be tried; and they determined the facts from their own knowledge. Now, however, the very reverse is the case: jurymen are not permitted to utilise their own knowledge at all—they must "find a verdict according to the evidence"—if they have any knowledge of the facts they must, to make that knowledge available, take their place in the witness-box and state the facts under oath as any other witness.

Evidence is (1) documentary; or (2) by witnesses. I need not speak of the former, but pass at once to evidence given by witnesses.

There are two classes of witnesses—the ordinary witness and the skilled or expert witness. The former is allowed to speak only of facts within his knowledge: being sometimes allowed to refresh his memory by the use of a written memorandum or entry in a book. He may not express his own belief or opinion except on some particular subjects where positive, and direct testimony may be unattainable, as for example, the identity of persons and things, the genuineness of disputed writing, whether two persons are attached to each other, and the like.

Where, however, on questions of science, art or trade, persons skilled in the particular branch of science, art or

trade are called upon not only to testify to facts, but also to give their opinions, they are called skilled witnesses, or more commonly "expert witnesses." So far as their evidence is as to the existence or non-existence of facts which can be conclusively established or demonstrated, it is not generally called expert evidence—that name being given to the opinions expressed by them as distinguished from the facts upon which such opinions may be based. Indeed it is by no means uncommon for an expert witness to sit in Court and hear the evidence given by others as to facts, and then give his opinion upon the facts so evidenced.

The old jibe, that "there are three kinds of liar—the liar, the d—d liar and the expert witness," had its origin and derives its vogue from this kind of expert evidence, i.e., opinion evidence. And it must be conceded that most of its popularity is due to the performances of medical witnesses.

It is not wholly unjust. There is—there can be—no doubt that the extraordinary antics of some called as medical experts are in many cases a disgrace to the medical profession—and that it is hard to reconcile their conduct with any other theory than that they are in the category of superlative liars—that they are worse than even "adjective" liars.

But too much should not be made of mere differences of opinion. "Doctors differ;" but it is not Doctors of Medicine alone—Doctors of Law are quite as irreconcilable in their views; while I presume it would be hard to find two Doctors of Divinity who agreed on all points. And Doctors of Medicine have much more reason—"excuse" is not the right word here—than these or those.

In law, too, there is the same divergence. It is true that the lawyer has not but one collection of little pamphlets to look to for his ultimate and inexpugnable authority—but his authorities are all well known, numerous as no doubt they are. They are authorities some of which at least are binding, although some are more commentary than text. "If it is law it will be found in our books. If it is not found there, it is not law," said Lord Chief Justice Camden. And yet it is not the common, but rather the unusual case that lawyers or Judges agree. Take for example, the latest case of my own which went to the Privy Council. In the interpretation of an Ontario statute upon the subject of insurance, I decided at the trial the meaning of certain

words in an Ontario statute in a certain sense—the Court of Appeal unanimously supported that judgment—in the Supreme Court two Judges thought I was right, but three thought I was wrong—the Judicial Committee of the Privy Council thought the majority of the Supreme Court wrong. In the latest case in which I have taken part in a judgment in an appellate Court, the inferior Court decided against the plaintiff: a Divisional Court composed of three able and careful Judges gave a considered judgment reversing the decision, two of the Judges being for reversal *in toto*, the third for reversal in part: in the Court of Appeal, composed of five Judges, no Judge could be found to agree with any of the Judges in the Divisional Court. I know personally, and have sat with, all these Judges, and can bear testimony, not only to their intellectual power, but also to their anxious desire to find out accurately what the law is—and yet how different the conclusions. There have been cases in which the plaintiff or defendant was successful alternately in the Courts on appeal, and the party ultimately successful perhaps achieved his final triumph only because there was not another Court to go to.

Now these were cases in which no troublesome question of fact was involved—the facts were admitted or had been conclusively established—all that was before the Courts was a question of dry law.

Why then expect expert witnesses to agree upon matters of opinion—whether they be practitioners of medicine or otherwise?

It is the first duty of a witness to tell the truth—the oath is "The evidence you shall give . . . shall be the truth, the whole truth and nothing but the truth." The words of the oath are not to be taken quite in the ordinary sense. When an accused person pleads "Not guilty," this is not in law a denial of the fact that he has committed the offence charged against him; but it is only a statement to the effect, "I do not admit that I committed the offence charged: prove that I did if you can"—so the witness is not supposed when he takes the oath to be undertaking to say all he knows—the oath paraphrased would read thus: "What you shall say in answer to the questions put shall be true and, being true, shall neither be a concealment of anything else that is true nor a suggestion of anything else that is false." To use the accepted legal terminology—the answer

shall not only be true so far as it goes, but it shall contain no *suppressio veri* and no *suggestio falsi*. For example, in a case in which an unmarried woman is suing for damages for a leg broken through the negligence of a railway company, her doctor when asked, "How did you find the plaintiff after the accident?" should not as a rule say, "I found her with a broken leg and enceinte." If he left out the latter fact he would indeed not be telling "the whole truth" in the popular sense of the words, but he would in most instances be doing so in the legal sense. If, however, (for instance), the damages claimed were based in part upon her being forced to remain for a long time in her room and the condition of pregnancy contributed to this, the witness would be guilty of a *suppressio veri* were he to omit to disclose the fact. So, if the witness is asked, "After your examination of this girl, are you prepared to swear that she was not with child?" and he were to answer, "Well, I am not prepared to swear that," and say nothing more, he might be guilty of a gross *suggestio falsi*—he would be, if he had carefully examined her without any thought of anything of the kind, and without suspicion having been aroused, if he did not add, "but I have no reason for thinking she was," or something of the kind.

But telling the truth is not the only duty of a witness. He owes it to himself and to the truth itself not only to tell the truth, but to make the truth tell—i.e., to make his evidence effective. Now by this I do not mean that a witness should take sides—the eager, the partial witness is too often dishonest and is always discounted; and nothing is more nauseating than to see and hear a witness stretching the facts, and in the ardour of his partisanship narrowly, if at all, escaping perjury. What I mean is, telling the truth in a manner as persuasive as possible, and as likely as possible to induce belief.

Speaking in general terms, the witness is called upon only to answer questions.

I on another occasion laid down three rules which it would be wise for witnesses to observe; and I now repeat them:—

First, "Understand thoroughly the question put, before attempting to answer it." If you do not thoroughly understand a question, have it repeated, interpreted or explained until you do. If the lawyer refuses to repeat or explain,

appeal to the Judge—you have your rights, and he will see to it that you are given them. If the question is ambiguous, you have the right to have the ambiguity removed. Do not, however, be hypercritical—do not dishonestly pretend not to understand a plain question because it chances to be an awkward one—nothing more prejudicially affects the value of a witness' testimony than an obvious desire to fence or to spar for time. Apply your mind honestly to the matter of the question and honestly endeavour to understand it—if the question is in reality unambiguous, do not dishonestly pretend to think it is ambiguous.

Again, "Having thoroughly understood what is asked, answer it as briefly and concisely as you can, consistently with the truth without suppression of the truth or suggestion of the false." If the question can be answered "yes" or "no" without some implication which is untrue, some *suppressio veri* or *suggestio falsi*, answer it "yes" or "no;" if it cannot, do not hesitate to say so. Say that an answer "yes" or "no" would convey a wrong impression; and refuse, however much pressed, to answer in a way which carries an implication of untruth. Do not heed the demand, so often made with an air of righteous indignation, for a plain answer to a plain question. It is a common thing for lawyers to insist that any leading question can be answered "yes" or "no" without any suggestion of the untrue: but try this one—"Have you quit beating your wife yet?" Many a witness has yielded to importunity and answered "yes" or "no," when in his soul he knew he should not—this is morally if not legally equivalent to perjury. But again do not be hypercritical—you will in many cases be told to answer "yes" or "no," and you will have an opportunity of explaining and amplifying later. Insist upon the opportunity, in justice to yourself and to the truth.

Remember, however, that it is the question put to you that you are to answer, not something else. Doctors are very prone to sin in this regard—called upon to testify as to facts, they indulge in opinion—asked to give an opinion of something rightly within their competence, they give an opinion upon something which is not. Time and again, I have heard doctors in cases in which insanity is set up, not remaining content with giving an opinion as to sanity in the legal sense, go on and say that the prisoner, in their view, should not be punished, but should be treated for the dis-

ease. That is not for the doctor, or, indeed, for the Judge either—it is for Parliament and the Executive.

Third, "When you have answered the question, SHUT UP." No witness is so dangerous to his own side or so much the prey of counsel on the other as the talkative witness—the heart of counsel leaps with joy when he sees his learned brother on the other side trying in the examination-in-chief to stem the flood of talk from a loquacious witness. It has been my own experience that no small proportion of cases are won and lost by some witness talking too much.

Now these seem rules simple to the verge of silliness—or over the verge; but if they were observed, I am confident that the time occupied by trials would be diminished by one-third or more. Go into a Court of justice and you will see witnesses failing or refusing to understand what they are asked—answering something entirely different, and talking at random long after they should have been silent.

As part of the duty to make the truth tell, the witness ought not to disregard any legitimate means of impressing the trial tribunal. For this, as well as for other reasons, he should avoid jesting and frivolity—the matter that is going on is a serious one: and there is seldom room for humour and more seldom still for wit. Few, if any, Judges appreciate any wit or humour but their own; and judicial wit and humour are well known to be the lowest species of either. It is rare, too, that a jury does not form a poor opinion of the joking witness.

It is said that the English-speaking people of this continent are becoming a race of jesters—and there is much truth in the charge. 'Tis true, 'tis pity; and pity 'tis 'tis true. Still the line is to be drawn when an oath is taken. If there were no other reason, there is at least this—it is seldom that wit or humour can be successful without exaggeration of fact or the use of words in a metaphorical or unusual sense—either should be absolutely tabooed in the witness-box. The medical man should not complain that he is not permitted to display his wit—the law is and should be no respecter of persons, and if one man may joke, so may another, and our Courts degenerate into a raree show instead of remaining a temple of justice. There is nothing which impresses a jury or a Judge more than the quiet dignity of a self-respecting man—respecting himself, he is willing to

respect others and he inspires respect in others. No counsel, however bumptious, can make headway against such a witness. Lord Mansfield says, "Ingenuity is one thing and simple testimony another, and plain truth needs no flowers of speech."

Nor should a witness think or pretend to think that his answers are for the information of counsel—questions which require no answer to men of education, as both lawyers and doctors are expected to be, may need to be fully answered for a common jury to understand the matter. A question is never asked—or seldom—that counsel may understand, but either for the information of the trial tribunal or to test the witness himself. In either case a straightforward, plain answer has the best effect; and nothing is gained by indignation at an apparently unnecessary question or by omitting to answer. "You must answer any questions that are not ensnaring questions."

The language in which an answer is framed is not without importance. I do not know that we are any more given to slang than other peoples—I find as much in London and New York, in Montreal and St. Louis as in Toronto—perhaps more. But there can, it seems to me, be not much doubt that this age uses more slang than any preceding one. Slang is said to be language in the making; and of course, much that was slang has now become good English—but in a Court of justice there is no more need of using language which is in the process of manufacture than in using customs which are in the same condition and have not yet crystallized into law. One very serious objection is that until the words have become old and thoroughly incorporated in the language, one person uses or may use them in one sense, another in another. Ambiguity is always a curse, and not less so in evidence than in aught else. I am not sure, either, that the slangy doctor impresses the jury any more favourably than the jester.

There is, however, another fault into which the medical man is prone to fall—I mean the use of highly technical language. Of course medicine, like every other art and science, has its own terminology, which it is wholly natural for its professors and practitioners to use. But much of it is "caviare to the general"—whether it be of Latin origin or not, it is Greek to a jury. Much may need to be couched in technical language for reasons of delicacy, or accuracy

or the like: but "bruise" is just as good as "contusion," "bleeding" as "hemorrhage," "broken arm" as fractured humerus." Wherever an accurate impression can be conveyed by the use of common language, common language should be used—where technical nomenclature can alone give the right idea, do not hesitate to employ it.

And remember always that you are not giving a lecture upon the subject or explaining matters to professional brethren—you are stating facts to be comprehended by the laity. If you do not make the trial tribunal understand you, of what avail is all your knowledge and learning?

The appearance of a witness is not without its importance—neatness of dress, cleanliness of person are not less pleasing in the witness-box than elsewhere. There is a philosophy of clothes, and Shakespeare knew it:

> "Costly thy habit as thy purse can buy,
> But not expressed in fancy: rich not gaudy;
> For the apparel oft proclaims the man."

Neither fop nor sloven can impress a jury like one dressed as a gentleman—though he may have all the learning in the world, he is handicapped by his outside. "The jay" is "not more precious than the lark because its feathers are more beautiful . . . the snake more precious than the eel because its painted skin contents the eye," but, on the other hand, the wise old proverb has it, "*Vestis virum facit*," and "Through tattered clothes small vices do appear; robes and furred gowns hide all." Goethe was wise in his generation when he said,

> "*Der Schein dem was ist er, das Wesen fehlt?*
> *Das Wesen wär' es wenn es nicht erscheine?*"

To do justice to himself, the witness should not omit to consider his physical condition. A doctor is supposed to be always in perfect condition, but there may be exceptions—I think I remember having seen some—in any case, the strain of a prolonged and strenuous cross-examination will test the strongest witness, especially if his nerves are a little on edge. A surgeon who expects to perform a critical operation will generally avoid stimulants or other "disorganizers." Does he follow the same rule when he is about to go through an ordeal as trying in some respects—in which, as in the operation, a slip may cost a life, or, if not, may at least prejudice a future?

The witness should prepare himself by reference to any notes or memoranda he may have made, by reflection on what took place, by examination of authorities to back any opinion he may have formed. Do not despise the counsel who is to cross-examine you: he may not know much about your science generally; but for the particular case he should, and if he has done his whole duty he does, know as much as you, and perhaps more. To the counsel who examines in chief be clear and accurate; but to the cross-examiner, as you value your peace of mind, be, if possible, even more so —do not fight with him, that is his business, and you cannot hurt him, though he may hurt you—be courteous and firm—don't hedge—do not make a pretence of omniscience —if you do not know a thing, do not hesitate to say so—no one will think the worse of you—be quiet, cool, dignified, and you are safe. Of course the lawyer will be irritating and will try to make you lose your temper or your self-control, but that is part of his policy—do not let that affect you. Do not joke with him even if he try to joke with you —it is not his desire to shew himself friendly to you that influences him—he is after your scalp—if he can make you "play the fool with mirth and laughter," it is likely he will get something from you that you should not give. If you reply in slang or ambiguous language, he will be apt to use the words in a different sense from that in which you used them. If you give a plain, serious answer in good English, he can make no more of it than he in justice should.

There are many complaints about cross-examination, and some may be deserved; the privileges of cross-examining counsel have sometimes been abused, as every other right may be abused.

But let us see what cross-examination really is. It is not as so many, even some lawyers, seem to think, "examining crossly." Cross-examination is the art of searching by questions into the mind of a witness in order that the trial tribunal may see, first, what the witness really means, and, second, how far what he says, may be relied upon.

There are many things to be taken into consideration in determining how far a witness can be relied upon. It must be plain that it would not do to allow him to state in his own way what he desired to say and then let him go. He might forget important parts of the story, he might load it with irrelevant detail he might speak loosely where exactness was

imperatively required, he might express opinions where he was called upon to state facts, he might guess or imagine where he should know or say he knew where he only fancied, he might state as fact what he had only heard—all these dangers and many more are ever to be guarded against.

Nor would it do to allow the story to be told under the guidance of counsel for the side for which the witness was called, with nothing more. No one who hears a witness tell his story under the hands of a skilful direct examiner (and direct examination is to my mind a more difficult art than cross-examination, and it is rarer to find a first-class direct examiner than a cross-examiner who deserves the same praise), but must be struck by the beauty and symmetry of the structure built up, and almost grieve to see it fall in pieces before counsel on the other side. Some way of testing the accuracy of evidence must be provided—and no means yet discovered can compare for a moment with cross-examination. No doubt injustice will sometimes result both to the witness and to the side for whom he is called, but in the vast majority of cases the evidence of the honest witness is not weakened, but it is strengthened by a rigorous and searching cross-examination—while the evidence of dishonest or incompetent witnesses is in numberless cases weakened or destroyed. "None but the sore feel the probe."

Nor is it only the dishonest witness whose evidence needs probing. The value of the evidence of a witness may and often does depend on much more than his honesty. There is first to be considered the witness' opportunity of knowing the facts. He may have been in the immediate presence of the actors or a distance away; he may have made a careful or a merely cursory observation or examination; it may have been clear daylight or the gloom of night—and many other circumstances may have to be considered in this view.

Then his capacity of understanding what he did observe—see or hear or feel—or his capacity to form an opinion of any value. His general intelligence, his education, his training, are all of importance in this enquiry.

Again, in observing fact or forming opinion, is he consciously or unconsciously swayed or influenced by social or moral, religious, political or racial prepossession or prejudice? The common impression amongst sellers of liquor is that no strong temperance man or prohibitionist can, in

cases of alleged illegal sale of intoxicants, see things as they really are. I do not say that this is true, but it will illustrate my meaning.

Has the witness any pecuniary interest, or interest of any kind, direct or indirect?

Then what kind of memory has he? Does he in fact remember what he says he remembers? Has he the reproductive and representative faculties of the mind so well developed and in such good condition that he can call to mind what did actually happen? Or is he only indulging in fancy and imagination?

And is he really expressing his thoughts by the language he is employing? It may seem an extraordinary statement to make, but it is undoubtedly true that not one man in twenty appreciates the value of an accurate use of language, and not one man in twenty can express precisely what he means so as to exclude the possibility of mistake.

Most important of all is honesty. I am glad to say that as a general rule medical witnesses are honest. Any witness who will give evidence contrary to the fact as he understands it or contrary to his real opinion, either to help a plaintiff to obtain a verdict when he should not, or a larger verdict than he should or to help a defendant to escape the legitimate consequences of wrongdoing is a thief; he is a criminal and should just as truly be behind the bars as the man who opens the vaults of a bank with dynamite. Expert witnesses will sometimes give testimony which is certainly a tissue of lies—no doubt were they prosecuted for perjury, they would shelter themselves behind the plea that they were giving an opinion only and not swearing to a fact—thus ignoring the truth that the existence or non-existence of an opinion is itself a fact. Perhaps the most striking and most shocking examples of this are in criminal cases where the defence of insanity is set up—the mention of such cases gives me a bad taste in the mouth, and I say no more.

And just here let me refer to something which is not uncommon—I mean exaggeration—which is a form of lying. If you do not believe it, read "Opie on Lying." Many witnesses appear to think that the trial tribunal will probably strike an average of the professional opinions given—they consequently exaggerate their own so that it may have the greater weight.

Some, too, do not seem to place any value on language, and while there is in their terminology a distinction between "yes" and "no," words of a less definite and fixed value are not distinguished. There is a difference between black and white, but dark-grey is with them one or the other, depending sometimes, and too often, upon the side which calls them.

Sometimes there is apparently an attempt to take advantage of the supposed ignorance of Judge or jury. For example, I have heard a medical man (who should be an expert) solemnly swear that anyone who believed in the possibility of communication with the spirit world was necessarily insane and incapable of managing his affairs. It was useless to refer him to intellectual giants from Socrates to Sir William Crookes and Sir Oliver Lodge or to business men like Stead—he stubbornly held to his opinion —or what he said was his opinion.

Such evidence as this is wholly harmful and improper—to use no stronger words.

Now, cross-examination is directed to the sifting of the evidence given so as to find (as has been already said) what the witness really means and how far what he says and means may be relied upon. Medical men should not complain that they are subjected to the same treatment as other witnesses. There are numberless cases in which not only straight perjury, but also concealment of the truth and false suggestions have been made plain by cross-examination, and cases are not unknown in which medical men of apparently the highest standing are shewn to have permitted themselves to express opinions wholly opposed to the well-recognised facts of their profession—opinions which no competent medical man could possibly entertain.

And as the Court is either conducting what should be a stern and careful investigation into an alleged offence against the people or is engaged in a civil case in what is the civilised substitute for a physical and personal combat between the contestants, and as each counsel is upon honour to do all he legitimately can for his client, no witness can ask that cross-examination shall be but trivial and not a trying ordeal. Lord Bramwell said, "It is well for the sake of truth that there should be a wholesome dread of cross-examination." I agree with him; this dread of cross-examination must undoubtedly tend to greater care in the giving

of evidence on the direct examination, and tend in general to make such evidence of greater value.

In much of what I have said, I have not distinguished between the doctor as an ordinary and as an expert witness. There is, however, one consideration in the latter case which perhaps deserves a word. The scandalous exhibitions of irreconcilable differences of expert opinion have called forth many comments, and it has been suggested that some remedy may be found. For example, I copy the following from a thoughtful article in a daily newspaper:—

"EXPERT TESTIMONY."

"There is some danger that the medical profession will be discredited by the competition for expert witnesses in damage suits and criminal cases before the Courts. In some instances the witnesses seem to become advocates for one side or the other, and the conflict of opinion does not tend to confidence either in the Courts or in the profession. Is it impossible to have a physician or a board of physicians of high standing appointed by the Crown or retained as Crown counsel are retained in criminal cases? If this is practicable (and there may be many objections which we have not considered), the evidence of such experts would be available alike for prosecution and defence. Judges and juries would have reports in which they could repose a greater degree of confidence, and in many cases perhaps a sounder administration of justice would be assured."

In certain criminal cases this is now the practice in Ontario. Wherever a crime is thought to have been committed and the accused is in custody—if there be any room to suspect his sanity, or if it be suggested that his defence may be insanity, two experienced alienists in the employ of the Ontario Government are sent to examine and report—these are not advocates, and their whole duty is to determine the exact fact. They are at the disposal of the defence, as well as of the prosecution, and in my experience they have been sometimes called for the defence. So, too, in cases of suspected poisoning, there is an analysis made at the instance of the Crown. No one has ever challenged the absolute honesty and fairness of the present analyst—his evidence is at the disposal of the defence, in the same way as that of the alienist.

But even in these cases, neither party is bound to accept as conclusive the evidence offered by these experts. Others may be, and often are, called; and I should consider it a most dangerous practice to hold any person bound by the opinion of any expert, however able and honest. In matters of insanity, e.g., men of equal ability, skill, experience and honesty may and often do entertain different opinions—while even in matters of chemical science, it should not be forgotten that a most careful, conscientious and capable chemist was forced to admit that arsenic he found upon his analysis came from his own reagents. Science is constantly advancing: and it may well happen in the future as it has happened in the past that the official expert falls behind the younger and non-official enquirer. Even in matters of law, the people are not, and should not be, satisfied with one expert—a trial Judge finds his opinion appealed against to a Divisional Court—the judgment of that Court is reviewed by the Court of Appeal; and it may be, the Supreme Court of Canada and the Judicial Committee of the Privy Council are ultimately required to determine what is the law. Law, too, as we have seen, is a science in which the theory is that somewhere in the books, if diligently sought for, will be found a decision or a principle which will conclude the case under consideration. How much more then should a litigant or an accused be at liberty to contest the opinion of an expert in a science which is living and ever growing—in which discoveries are being made yearly—I had almost said daily and hourly?

It must be, then, that other than the official experts may be called: and this should, as it seems to me, be fatal to any idea of an official, individual or collective, being appointed as a standing referee upon scientific questions. In all but the exceptional cases mentioned, each party must under our practice procure his own experts: and while it cannot be said to be wholly satisfactory, I have not yet seen any scheme proposed which is at all feasible.

But we do not expect any human institution to be without faults; and Courts are human. The Judge may never have known or may have forgotten some principle of law—an old Judge said: "God forbid that an attorney or even a Judge shall be considered to know all the law." The jury may be swayed by sympathy or prejudice, or may be unintelligent or misled, and may perversely find a verdict not ac-

cording to the evidence: and it is too much to expect that any method of giving any kind of evidence, expert or otherwise, will be perfect. "No system of judicature can be devised or suggested in which occasionally failure to insure complete justice may not arise."

So much had been written when I was favoured with the perusal of the address of your president, given on October 4th of the present year; out of courtesy to him, it would seem proper that I should say a word or two in respect of his remarks. He says:—

"The position of the medical (so-called) expert witness in our Courts of justice has always appeared to me to be an anomalous one, brought about partly by the practice of allowing lawyers to cross-examine in such a way that it is hard for any but the most astute to avoid giving a wrong impression and partly by the practice of taking sides. For doctors to enter the witness-box and testify to one opinion for a fee, whilst others swear to an opposite opinion for a larger fee, is not in the best interests of the profession, and it is hard to reconcile with the best interests in the course of justice.

"I have long held the opinion and still hope that the so-called medical expert will be abolished and the medical advisers will be employed by the Crown instead. In that way his position would not be in any way that of an advocate for either one side or the other, but would be entirely judicial, and his whole object would be to help the presiding Judge to a correct understanding of the intricate medical problems presented. I believe that in this way the real cause of justice would be furthered."

With great respect for anything Dr. Macdonald could say, it seems to me that he has fallen into errors which, considering his point of view, are not wholly unnatural. He says that the position of the medical (so-called) expert witness is an anomalous one. This is incorrect—his position, so far from being anomalous, is entirely normal; and it is the same as that of an expert witness in any other art or science, chemistry, mechanics, electricity, painting, veterinary surgery, dressmaking, even law itself—(that is foreign law, the Judge is himself an expert in his own law)—and if a medical adviser is to be appointed, why not a chemical, mechanical, veterinary and artistic expert? As to helping the presiding Judge to a correct understanding of the intricate medical

problems presented, I deny that there are such problems. At the peril of being considered guilty of lese majeste against Queen Medicine, I assert that there are no intricate medical problems ever presented to the Courts or any medical problems at all which cannot be understood by a Judge of ordinary intelligence and education. Medicine, my friends, has passed the stage of mystery and occultism—it is now a science of common sense, and there are no arcana sacred from the intrusion of the layman. No priest of the cult can cry "*Procul, o procul este, profani,*" nor may two augurs meet and join in smiling congratulations while each whispers "*Odi profanum vulgus et arceo.*"

How is the expert to be appointed? By the Crown? That means by the Government for the time being. In our system of Party Government, is the best man always appointed? Is the Deputy Minister of Justice, or the permanent adviser of any minister, always at the head of his profession? Are the members of the medical profession themselves in all cases perfectly satisfied with and content to be bound by the evidence given by some who are frequently called as witnesses by the Crown.

Or are the experts to be appointed by the Judge? I know of Judges who would always feel disposed to appoint a Homeopath—others to whom Hahnemann is anathema; one of my own old perceptors was an Eclectic, and had an exalted opinion of the virtues of Thompson's No. 6.

Or are they to be elected by their brethren? You have now a council elected: and it seems to me that I have somewhere heard that it is just possible some of the electors were not wholly satisfied with their representatives there. Indeed, if I am not under a mistake, some have even gone so far as to speak out in no uncertain tones their thorough dissatisfaction.

The reprobation of the practice of cross-examination, I have already alluded to—the medical man must altogether repudiate any idea that he is a Judge in a Court of Justice; and he must submit to having his views challenged and all reasonable tests applied to determine the real value of his evidence. Is the ignorant quack to be spared exposure of his ignorance and pretension just because he has the letters "M.D." after his name, and who, without cross-examination, knows but you are as ignorant as he? He will be as pompous and impressive as you can be. Who can tell your worth till he tries?

Courts exist not for the witness any more than for the lawyer or Judge, but for the litigant—and it is the interest of the litigant alone which is to be considered—his interest is the interest of the people who pay for the Courts.

Medical men must face the situation—so good a friend of the profession as I, may be pardoned a little plain speaking. A great deal of the odium attaching to the expert medical testimony is due to natural difference of opinion and is consequently unjust: most of it is not. For the most part it is due to medical men themselves and the remedy (so far as any remedy is possible) is in the hands of the medical men also. The trouble in the main arises from two causes. First, downright ignorance. The very high standard of professional attainment reached by the practitioners of medicine in our province is well known, and I am proud of it, as everyone should be: but it must be admitted that there are exceptions. Some there are who cease to be students the day they pass the council; some who during their course in college are satisfied with the minimum required to pass the examinations. They are, and they remain ignorant. Again, and it pains one who respects and esteems the medical profession as I do, to say it—there is often absolute dishonesty in the medical as in every other kind of expert. Your president had been drinking of the waters of sweetness when he said, "For doctors to enter a witness-box and testify to one opinion for a fee, whilst others swear to an opposite opinion for a larger fee, is not in the best interests of the profession, and is hard to reconcile with the best interests in the cause of justice," (unless, indeed, Dr. Macdonald was speaking of honest and well-considered differences of opinion.) If these "opinions" were dishonest, the doctors were perjurers—if formed without careful consideration, they were pretenders—in either case a disgrace to the profession. If the opinions were honest and well-considered, how determine which was right? And how remedy the difficulty? By leaving it to another expert equally fallible?

Let medical witnesses be masters, as they should be, of their science, and practice plain, simple honesty; and most of the scandal will disappear.

But as I have already said, difference of opinion must be expected. Medicine is not mathematics, not an exact science —and it is not and never can be a matter in which authority is supreme.

There is no prospect of medicine becoming anything like an exact science until—and unless—experiment be permissible upon the human frame. This cannot be done now—the doctor treats, he does not experiment, he is in duty bound to do the very best for that particular patient, not for medical science generally.

We must, I think, "Rather bear the ills we have, than fly to others that we know not of"—and be content with our present system till we can get a better.

What is the remedy? The Judge may become more diligent and make more extended or more careful enquiry into his authorities—the jury may cast out all feeling of sympathy, prepossession and prejudice, and all else than a real desire to do justice according to the evidence: and the expert witness, I think, can help by being always, not only learned, but also independent, impartial—in a word, honest. But even then, I repeat once more, opinions must be expected to differ.

I have entirely failed in one chief object of my address to-night if I have not made clear that the members of the medical profession must take hold of this matter of expert evidence themselves.

The Judges cannot help you, they are bound by precedent; the lawyers will not, they have their account in the disagreement of experts; the legislature cannot be expected to give medical men as witnesses a position different from or superior to that of any other class of the community.

Now, while there are, of course, black sheep in the medical as in every other profession, their number is not great; and with the exception of these few, I am confident an enlightened regard for truth, for the good of the public and of the profession, must be all-powerful. Even the black sheep have some regard for their general repute among their brethren. If they knew that a doctor who gave a dishonest opinion would be shunned and scorned like any other perjurer even their conduct would be more nearly honest.

There is no reason why medical experts should not stand at the very head of all expert witnesses, as they ought, instead of being, as they are, at the very foot. And I am not entirely without hope that the day is not far distant when such will be the case. If anything I have said will help, in however small a degree, to speed that day, I shall feel amply repaid.

IMPERIAL AND INTERNATIONAL AFFAIRS.

THE INDIAN EMPIRE.—Lord Minto has returned to England, and has, curiously enough, been succeeded in the office of Viceroy of India by Lord Hardinge—whose ancestor was recalled from the Governor-Generalship of that country in 1847 to make way for Lord Dalhousie. Lord Minto has not been able to write his name large on the proconsular roll of Great Britain, but so far at least as India is concerned it takes a man of surpassing ability to "come over" at all. The difficulties of the office are thus described by Justin McCarthy:—"The statesmen of India perform their parts upon a vast stage, and yet they are to the world in general somewhat like the actors in a provincial theatre. They do not get the fame of their work and their merits. Men have arisen in India whose deeds, if done in Europe, would have ranked them at least with the Richelieus and Bismarcks of history, if not actually with the Caesars and Charlemagnes; and who are yet condemned to what may almost be called a merely local renown—a record on the roll of great officials."

Lord Minto has bequeathed to Lord Hardinge. problems almost as difficult of solution as those the latter's ancestor handed over to Lord Dalhousie in the middle of the last century. Sedition against British rule is widespread, and there is a recrudescence of religious fanacticism among the natives that expresses itself in outbreaks of violence on the slightest provocation. Riots have recently taken place at Calcutta between the Hindus and the Mohammedans over the sacrifice of cows by the latter. The Hindus, having petitioned the government to no purpose to prohibit this offence against their religious sensibilities, took the matter into their own hands, and removed a cow from a Mohammedan stable where it was being kept for sacrifice. This brought on a bloody riot between the devotees of the two religions which raged for nearly twenty-four hours and was only suppressed by the troops with the greatest difficulty. At Bombay, on the 12th January, an emeute broke out between two sects of Mohammedans (the Sunnites and the Shiahs) over the celebration of the Muharram, which troops were also required to quell. Added to these troubles, there is a very active propagandism being carried forward by the votaries of both these religions for the expulsion of Christ-

ianity from India. There is much intellectual force behind this movement, too, for the decadence of religion in the Western world is held up to the educated natives, the literature of apostacy in Europe and America being sedulously circulated among them. The victory of the Japanese over the Russians is also fanning the ambition of the brown men to throw off the yoke of their Caucasian masters. Altogether, it would seem that things are in a very bad way in India, and statesmanship of the very highest order is necessary to maintain the *status quo*.

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MORTMAIN IN ENGLAND AND ONTARIO.—The Court of Appeal in England, in the case of *Re Hoyle; Row* v. *Jagg* (1910), 55 Sol. J. 169, dealt with the question of mortmain as applied to a charitable bequest by a domiciled Englishman of mortgages of land in Ontario. It was held (by Cozens-Hardy, M.R., and Farwell, L.J., Fletcher Moulton, L.J., *dubitante*) that the mortgages in question were to be regarded as immovables, and that by the law of Ontario (the *lex loci*) a bequest of immovables to a charity was invalid. In delivering judgment the Master of the Rolls said: "I think a mortgage debt secured by land is to be regarded, not as a movable, but as an immovable. A Scotch heritable land has always been treated by our law as immovable, although there is a personal obligation to pay (*Jeningham* v. *Herbert*, 4 Russ. 388; *Re Fitzgerald*, [1904] 1 Ch. 588). But apart from authority, I should have arrived at the same conclusion from considering the nature and extent of the rights of a mortgagee of freehold land. If he sues on the covenant to pay, he must reconvey the land on payment If he has parted with the land, otherwise than in exercise of a power of sale, he would be restrained from suing on the covenant (*Lockhart* v. *Hardy*, 9 Beav. 349; *Palmer* v. *Hendrie*, 27 Beav. 349 and 28 Beav. 341; *Kinnaird* v. *Trollope*, 36 Ch. D. 636). The result is that a mortgagee cannot assign the mortgage debt effectually without also transferring the security upon the land. This ground is sufficient for disposing of the present appeal, for it is conceded that if the Ontario mortgage is to be regarded as an immovable—to which the law of Ontario applies just as much as to land in Ontario, the *lex loci* must prevail, and that the *lex loci* does not allow a mortgage to be bequeathed to a charity."

QUIETING NATIONAL TITLES.—At the recent Trans-Mississippi Commercial Congress, Mr. James L. Slayden, a trustee of the Carnegie Peace Fund, introduced the following resolution, which passed unanimously: "Whereas, in the opinion of the Trans-Mississippi Commercial Congress, now in convention, the peace and the commercial development of the American continent would be more certainly and speedily secured if the various South, Central, and North American Governments were reasonably assured against the forced permanent loss of territory, as a consequence of war, or otherwise; Therefore, be it resolved that the President and Secretary of State of the United States be requested to enter into negotiations for the making of a treaty that will forever quiet the territorial title of the various American States; and be it further resolved that this Congress heartily endorses the idea of arbitration of all international disputes, and their settlement, if necessary, in the great peace court of the world at the Hague." If the treaty advocated in the above resolution were achieved it would mean that the principles of the Monroe doctrine would at last be built into the fabric of International law.

* * * *

DIVORCE COMMISSION.—The English Royal Commission on Divorce has closed its public sittings, but some statistical and documentary evidence has yet to be obtained before the report is framed. Lord Russell, in giving evidence before the Commission said that there were three great defects in the existing law which ought to be remedied:—"(1) The premium placed upon adultery and the advantage given to those who are willing to commit it; (2) the practical denial of divorce to the poor; and (3) the provision of an illusory remedy in many cases of matrimonial hardship, such remedy itself being directly provocative of further adultery. In the case of the poor, the petitioner might be in law fully entitled to his remedy, but unless he could find a sum varying from £30 to £70 he must go without. This sum to be spent in one lump was probably out of reach of four-fifths of the husbands and nine-tenths of the wives of the country." It remained for Mr. Maurice Hewlett, the novelist, to supply the Commission with a *reductio ad absurdum* in the way of reform. He is reported to have urged, among other proposals, "that marriage should be voidable by agree-

ment of the parties and evidence from one of them that desire or intention was absent or elsewhere engaged, saving always the interests of children. In all cases of divorce the Court ought to be assisted by two lay assessors—one male and one female."

* * * *

ART AND IMPERIALISM.—Now that the spacious "Victoria Memorial Museum" building has been opened at Ottawa, the following letter written by Mr. J. M. Solomon, of Johannesburg, to the *Times*, will be read with interest by Canadians: "My interest in the development of South African art prompts me to make the suggestion that no better way could be found for strengthening the Imperial bond than that the Colonies of the Empire should be allowed to benefit by the enormous collection of objects of *virtu*, prints, and engravings now stored away in the British and South Kensington Museums. About one-fourth of the estimated population of the world is contained within the bounds of the Empire; and when, therefore, it is realized how small a percentage of its 50 odd million of whites is ever likely to have the opportunity of visiting the Mother Country it must be readily admitted that a greater purpose will be served by the occasional exhibition of some of these treasures in centres where they would be more easily accessible. I fully realize the difficulties to be surmounted and the prejudices to be overcome, and do not for an instant suggest that the more valuable and rarer of these objects should be sent; but where duplicates occur—and these are many—there can be no objection. One exhibition of this kind a year in a prominent centre of each of the Colonies of the Empire is likely to do much towards inculcating some idea of the extent of the heritage in which they have come to share, and would be responsible for more firmly cementing the bonds between the rank and file of the Imperial public than months of political oratory or Press publication."

* * * *

GERMAN PUNISHMENT OF BRITISH SPIES.—The two British officers, Captain French and Lieutenant Brandon, who were seized at Bookum on August 22nd, while sketching the fortifications there, have been convicted by the Imperial Court at Leipzig, and sentenced to four years' imprisonment

in a fortress. Considering everything, the sentence is a light one, and it is rumored that a pardon for both may be issued within a year. The prisoners frankly confessed that they were engaged in securing information for the Intelligence Department of the British Admiralty. All this indicates that Anglophobia is not exceptionally acute in Germany at present, notwithstanding the remarks of some English yellow journals to the contrary.

* * * *

SALE OF RES IN ADMIRALTY PROCEEDINGS.—In the case of *Lamberts' Point Towboat Co.* v. *United States* (1910), 182 Fed. Rep. 388, the Circuit Court of Appeals, Fourth Circuit, has decided that where a Court of Admiralty has ordered the sale of a ship by the marshal at public auction, the order is not complied with by the acceptance by the Court, after failure to sell by the marshal at a public auction previously held, of a private bid therefor made in open Court. Goff, J., in delivering the judgment of the Court said: "We are unable to sustain the suggestion that the sale was in effect conducted by the marshal, who was in fact present, and who afterwards made the deed to the purchasers. That officer had given no notice that the sale would then be made, and the public was in entire ignorance of the fact that it was then being consummated in the Court. The marshal was present, but he did not conduct the sale, which was entirely under the control of the Court. The proceedings were in open Court, the conditions were unusual, the Court was embarrassed by a situation unique and never likely to be duplicated, and we doubt not the learned Judge acted conscientiously, actuated solely by a desire to be fair and just to all." The case of the *Monte Allegre* (9 Wheat. 616), was referred to by Goff, J., and distinguished. Compare the two English cases *La Purissima Conception* (Coote's Adm. Pract., 2nd ed., p. 129); *The Planet* (5 Asp. M. L. C. 144).

* * * *

THE NORTH ATLANTIC FISHERIES.—The agreement touching the North Atlantic Fisheries reported, at the moment of writing, as having been arrived at by the representatives of the United States, Canada and Newfoundland is extremely gratifying to all those who wish a speedy disposi-

tion of the matters of detail left open by the Hague award. If the agreement is confirmed by all the parties in interest there will be no necessity for the Committee of experts contemplated by the award, nor for any further appeal to the Hague. The agreement provides for the arbitrating by a permanent tribunal, erected by consent of the parties, of all future disputes that cannot be arranged through the ordinary channels of negotiation.

CHARLES MORSE.

THE PUNCTUATION OF WILLS.

That a testator may be, or make, his own dictionary is an often quoted maxim in the construction of wills; how far he may be his own grammarian does not appear to have been as definitely decided.

The infinite capacity of apparently taking pains to conceal their real meaning, which almost amounts to genius in the case of illiterate or amateur testators, or of their imperfectly instructed advisers, renders it difficult to extract from the authorities any universal principle of construction with reference to ungrammatical wills; but it has been laid down as a general rule that the construction of a will does not depend upon the grammatical skill of its writer (*Sandford* v. *Raikes*, 1 Mer. 646), and it has also (in accordance with the statement taken from Wigram on Extrinsic Evidence, pl. 96, as cited with approval by the Court of Appeal in *Dawson* v. *Higgins* (1900, 2 Ch. 756), that "every claimant under a will has a right to require that a court of construction in the execution of its office, shall—by means of extrinsic evidence—place itself in the situation of the testator") been decided that, whilst it is from the words and context, and not from the punctuation, that a testator's meaning is to be collected, yet, when words and phrases are of a doubtful meaning, punctuation and other circumstances may be referred to to assist the explanation: *Sandford* v. *Raikes* (*supra*), *Gordon* v. *Gordon* (L. R. 5 H. L. 254, 270). That the testator may have been imperfectly acquainted with the use of legal language, or may have used language the legal interpretation of which does not carry out the intentions which he had in his mind will not (or should not) in-

duce the Court to put a meaning on his words different from that which the Court judicially determines to be the meaning which they bear. Some of such decisions as there are upon the subject have turned more particularly upon the use of capital letters, stops, and parentheses, but it too frequently happens that the same illiteracy which has, in one part of the will, misplaced what should really have been a guide to its meaning has used exactly the same sign-post in another part of it apparently as a guide to lead to an opposite or inconsistent conclusion.

It is stated in Jarman on Wills (6th ed., vol. 1, p. 45), that there are probably very few imaginable cases in which punctuation could exercise a very important influence upon the construction of wills, but that in recent times the Courts have, without hesitation, adopted the practice of examining the original will, with a view to seeing whether anything therein appearing—as, for instance, the mode in which it was written, how "dashed and stopped"—could guide them in the true construction to be put upon it. Thus in *Turner* v. *Hellard* (30 Ch. D. 390), where a legatee's name was supplied for a blank, a majority of the Court of Appeal decided that, for the purpose of construing a will the Court is entitled to look at the original will as well as the probate copy.

Lord St. Leonards had previously said, in *Heron* v. *Stokes* (2 Dr. & W. 98), that as to a dash by which two clauses were separated, it was impossible for the Court to attach any weight to the circumstance; and that in wills and deeds you do not ordinarily find any stops, but the Court reads them as if they were properly punctuated. Importance has, however, been attached to the division of a will into paragraphs: *Jull* v. *Jacobs* (L. R. 3 Ch. D. 703), or into lines: *Milsom* v. *Long*, (3 Jur. N. S. 1073), but in *Gordon* v. *Gordon* (*supra*), the recurring use of the words "as to" at the commencement of several devises was held not necessarily to be an indication of the commencement of a devise complete in itself, and separate and independent from other limitations. In *Compton* v. *Bloxham* (2 Coll. 201), some reliance was placed upon the fact that the words "my moneys" began an entirely new sentence; in *Gascoigne* v. *Barker* (3 Atk. 8), Lord Hardwicke ruled, though with reluctance (*Banks* v. *Denshire*, 1 Ves. Jun. 63), that a parenthesis was not to be rejected, though, according to the rules

of grammar, a sentence might be complete without it; in *Child* v. *Elsworth* (2 DeG. M. & G. 679), which was described by Lord Cranworth as a question rather for a grammarian than a lawyer, and one which a school-master might decide as well as a Judge, notice was taken of the continuity of a sentence, and that it was closed with a full stop; in *Gauntlett* v. *Carter* (17 Beav. 586), some weight was attached to the introduction of commas, although it did not appear when or by whom they were inserted; in *Manning* v. *Purcell* (7 DeG. M. & G. 55), regard was had to erasures in the original will, omitted in the probate, and apparently to the symbols," &c., &c.," in *Jebb* v. *Tugwell* (*ibid.* 668), the existence of a mark of punctuation "a full stop" is noticed, but apparently is not very material; and in the unique case of *Manchee* v. *Kay* (3 Giff. 545), a legacy given as £1. 0. 0." which stood between two other legacies for £100 each—the dots between the figures being smeared as if for the purpose of obliteration—was held to be a legacy for £100.

The general conclusion to be drawn from the authorities may probably be taken to be that stated in *Gordon* v. *Gordon* (*supra*)—namely, that the first course of construction is to read the will in its natural grammatical sense, and then only, if that fail to produce a clear meaning, to look out for some other possible sense; and that when a meaning is clear and plain grammatically, no other should be sought for. Further, although, in construing a will if the words used are themselves of a doubtful meaning the circumstance of the case may, as already stated, be referred to for the purpose of assisting in the explanation, those circumstances must not be employed to shew the construction to be doubtful, in order to enable the Court to make what appears to be a reasonable will for the testator.

Nothing that is said above must be taken to apply to the construction of any documents other than wills. Punctuation has no place in deeds or weight in Acts of Parliament." *Grammatica falsa non vitiat chartam*: 9 Co. 48. No one, it has been said, would wish the title to his estates to depend on the insertion of a comma or semi-colon, and the absence of stops puts difficulties in the way of forgery. In Acts of Parliament "there are no such things as brackets, any more than there are such things as stops."

FIRE INSURANCE AGENTS AS CONVEYANCERS.

It may not be generally known that these agents in country places engage largely in the business of conveyancing. The owner of a house, barn, or other building has a policy issued by such an agent. A sale of the property takes place; and a deed is to be drawn, and possibly a mortgage to secure balance of purchase money. From previous acquaintance with the agent he knows that he can write, and possibly has a typewriter; and he goes and bargains with the agent to draw all the papers. The agent, notwithstanding his lack of legal training, will undertake it, and agrees to do a cheap job, looking more to his commission on the insurance premiums, and desiring by all means to retain a "client." In this way a relationship of *quasi* solicitor and client is established, without the responsibility of the regularly admitted solicitor, of which the client may be quite ignorant or indifferent. The interests of shareholders in Fire Insurance Companies are jeopardized; because such an agent when loss by fire occurs is under the temptation to pass over suspicious circumstances or signs or rumours of incendiarism, and use his influence to get the policy paid with as little investigation or inquiry as possible. It is said that in country places, especially, many fire losses have been paid, which, whether in the interests of the companies or the general public, never should have been paid. An agent who gets the reputation of making easy settlements is sought after by ignorant and dishonest people.

One remedy for this state of things would be for the companies to prohibit their agents from doing conveyancing, and require them to confine themselves to insurance. Another remedy would be for the Legislature to make law stamps necessary to the validity of all conveyances drawn by persons other than those paying annual fees to the Law Society. A stamp of one or two dollars on each instrument would contribute to the Provincial Treasury, and be in the interest of the general public. For ascertaining whether or not the law was being obeyed, the principle of sec. 25 of ch. 174 R. S. O., whereby registrars and other public officers are required to make a list of the names of those who, by the papers filed, appear to have practised as solicitors during the preceding year, could be applied.

January, 1911. BARRISTER.

IN THE SUPREME COURT OF CANADA.

WILLIAMS v. BOX.

MAN.] [NOVEMBER 2ND, 1910.

Title to Land—Mortgage—Foreclosure—Equitable Jurisdiction of Court—Opening up Foreclosure Proceedings—Construction of Statute—"Real Property Act" R. S. M. (1902), c. 148—5 & 6 Edw. VII. ch. 75, sec. 3 (Man.)—Equity of Redemption—Certificate of Title.

By the effect of the provisions of section 126 of the Manitoba "Real Property Act," R. S. M. (1902), chapter 148, as amended by section 3 of chapter 75 of the Statute of Manitoba, 5 & 6 Edw. VII., the Court has equitable jurisdiction to open up foreclosure proceedings in respect of mortgages foreclosed under sections 113 and 114 of the Act, notwithstanding the issue of a certificate of title, in the same manner and upon the same grounds as in the case of ordinary mortgages, at all events where rights of a third party holding the status of a *bonâ fide* purchaser for value have not intervened. Judgment appealed from (19 Man. R. 560), reversed.

Appeal allowed with costs.

Coyne, for appellant.

G. W. Baker for respondent.

GRAND TRUNK PACIFIC RY. CO. v. WHITE.

ALTA.] [NOVEMBER 2ND, 1910.

Construction of Statute—Public Works Health Act—R. S. C. (1906), c. 135, s. 3—Regulations—Breach of Statutory Duty.

Section 3 of The Public Works Health Act (R. S. C. (1906), c. 135), provides that "For the preservation of health and the mitigation of disease amongst persons employed in the construction of public works, the Governor-

General in Council may from time to time make regulations: (d) for the provision of hospitals on the works and as to the number, location and character of such hospitals; . ."

Held, that the above works "for the preservation of health and mitigation of disease" govern the construction of the whole section and a company directed to provide a hospital for such purpose is not obliged to furnish it with appliances for treating employees personally injured on its works.

Appeal allowed with costs.

Chrysler, K.C., for the appellants.

Ewart, K.C., for the respondents.

LEWIS v. STANDARD MUTUAL FIRE INS. CO.

MAN.] [NOVEMBER 21ST, 1910.

Insurance against Fire—Policy — Statutory Conditions — Gasoline on Premises—Illuminating Oils Insured — Notice of Loss—Remedial Clause in Act—Discretion of Court.

By the Manitoba Fire Insurance Act (R. S. M. (1902) c. 87), an insurance company insuring against loss by fire is not liable "for loss or damage occurring while . . gasoline . . is stored or kept in the building insured or containing the property insured unless permission is given in writing by the company." Insurance was effected "on stock consisting chiefly of illuminating and lubricating oils, &c., and all other goods kept by them for sale." A small quantity of gasoline was in the building containing the stock when it was destroyed by fire.

Held, that gasoline being an illuminating oil, it was part of the stock insured and the above statutory condition could not be invoked to defeat the policy.

Held, per Anglin, J., that if gasoline was not insured as an illuminating oil it was within the description of "all other goods kept for sale."

By s. 2 of the said Insurance Act "where, by reason of necessity, accident or mistake the conditions of any contract of fire insurance on property in this province as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with . . .

or where from any other reason the Court or Judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions," the company shall not be discharged from liability.

By statutory condition 13 (a) in the schedule to the Fire Insurance Policy Act every person entitled to make a claim "is forthwith after loss to give notice in writing to the company."

Held, Fitzpatrick C.J., dissenting, that the above clause applies to said condition.

Judgment appealed against (19 Man. R. 720), *sub nom. Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.*, reversed, Fitzpatrick, C.J., dissenting.

Appeal allowed with costs.

Coyne, and *S. H. Green*, for appellant.

Affleck, for respondents.

SISTERS OF CHARITY v. VANCOUVER.

B.C.] [NOVEMBER 21ST, 1910.

The "Vancouver Incorporation Act," 64 Vict. c. 54 (B. C.), by sub-section 3 of section 46 provides that "The buildings and grounds of and attached to and belonging to any incorporated seminary of learning, public hospital, or any incorporated charitable institution, whether vested in trustees, or otherwise, so long as such buildings and grounds are actually used and occupied by such institution, or if unoccupied, but not if otherwise used or occupied shall be exempt from taxation; provided that such grounds shall not exceed in extent the amount actually necessary for the requirements of the institution. The question as to what amount of land is necessary shall be decided by the Court of Revision, whose decision shall be final."

Held, per Davies, Duff and Anglin, JJ., that the functions in respect of the limitation of exemptions from taxation so vested in the Court of Revision are quasi-judicial and must be exercised in each case with respect to that case

alone; it is not vested with power to lay down a general rule based solely upon general considerations.

Per Idington, J.—That the provision in question was merely a delegation of a legislative or administrative power, probably carrying with it a duty, but in no manner implying the discharge of a judicial duty subject to review or supervision.

In proceedings, by *certiorari*, to remove a decision of the Court of Revision, the evidence adduced in support of the contention that the Court had failed to dispose of the question in a proper manner consisted merely of a minute of its proceedings whereby it was resolved "that all charitable institutions mentioned in sub-section 3 of section 46 of "Vancouver Incorporation Act," be exempted from taxation to the extent of the area occupied by the buildings thereon and an additional amount of land equal to 25 per cent. of the area, and that the assessment roll for 1900, as amended, be confirmed."

Held, affirming the judgment appealed from (15 B. C. Rep. 344), that this minute, in the absence of further evidence, was not incompatible with the view that the Court of Revision had examined each particular case before deciding to act in the sense of the minute and that it would be a proper direction in each individual case.

Judgment appealed from (15 B. C. Rep. 344) affirmed.

Appeal dismissed with costs.

Lafleur, K.C., for appellant.

Craig, for respondents.

THE BLACKWOODS CO. v. THE CANADIAN NORTHERN RY. CO.

RY. BD.] [DECEMBER 9TH, 1910.

The Board of Railway Commissioners for Canada has not the power to order that a private industrial spur-track or siding, constructed and operated under an agreement between a railway company and the owner of the land upon which it is laid, and used only in connection with the busi-

ness of such owner, shall be also used and operated as a branch of the railway with which it is connected.

Appeal allowed with costs.

W. L. Scott, for appellants.

Chrysler, K.C., for respondents.

SOVEREIGN BANK v. McINTYRE.

ONT.] [DECEMBER 23RD, 1910.

Evidence—Burden of Proof—Banks and Banking—Sale of Bank Stock—Offer to Shareholders—Shares Refused or Relinquished—Sale to Public—Authority.

A bank sued M. on a promissory note alleged to have been given in payment for part of a new issue of its stock. M. pleaded want of consideration and non-receipt of the shares. On the trial a resolution by the bank's directors was proved authorizing the offer of the new issue to the then shareholders (of whom M. was not one), and counsel for the bank admitted that there was none allotting it to anybody else.

Held, Idington and Duff, JJ., dissenting, that the onus was on M. to prove that the shares had been sold to the public without authority and he had failed to satisfy it.

Held, per Idington and Duff, JJ., that the onus was originally on M., but the evidence and admission of counsel had shifted it to the bank which did not furnish the requisite proof.

Appeal allowed with costs.

A. C. Macdonell, K.C., for appellants.

J. M. McEvoy, K.C., for respondent.

RODD v. COUNTY OF ESSEX.

ONT.] [DECEMBER 23RD, 1910.

Municipal Corporation—Statutory Duty—County Officers—Office Accommodation — Discretion — Mandamus.

The selection of the place in an Ontario County at which an office shall be provided for the County Crown Attorney

and Clerk of the Peace rests with the County Council and the Courts should not interfere with the reasonable exercise of the Council in making such selection.

Judgment of the Court of Appeal (19 Ont. L. R. 659), affirmed.

Appeal dismissed with costs.

Wigle, K.C., for appellant.

A. H. Clarke, K.C., for respondent.

ALTA.] [DECEMBER 9TH, 1910.

LIMOGES v. SCRATCH.

Mechanics' Lien—Construction of Statute—Alberta Mechanics' Lien Act—6 Edw. VII. c. 21, ss. 4 and 11—Building Erected by Lessee—Liability of Owner.

Section 4 of The Alberta Mechanics' Lien Act (6 Edw. VII. ch. 21), gives to any contractor or material man furnishing labour or materials for a building at the request of the owner of the land a lien on such land for the value of such labour or materials. Sub-section 4 of sec. 2 provides that the term "owner" shall extend to and include a person having any estate or interest "in the land upon or in respect of which the work is done or materials are placed or furnished at whose request and upon whose credit or on whose behalf or with whose privity or consent or for whose direct benefit any such work is done," &c. By sec. 11, "every building . . . mentioned in the fourth section of this Act, constructed upon any lands with the knowledge of the owner or his authorized agent . . . shall be held to have been constructed at the request of such owner," unless the latter gives notice within three days after acquiring such knowledge that he will not be responsible.

The lessee of land, as permitted by his lease, had buildings thereon pulled down and proceeded to erect others in their place, but was obliged to abandon the work before it was finished. The owner of the land was aware of the work being done, but gave no notice disclaiming responsibility therefor, mechanics' liens having been filed under the Act.

Held, that the interest of the owner in the land was subject to such liens.

Judgment appealed from varying that at the trial (2 Alta. L. R. 109), in favour of the lienholders, affirmed.

Appeal dismissed with costs.

Perron, K.C., for appellant.

Bennett, K.C., for respondent.

B.C.] [DECEMBER 9TH, 1910.

VANCOUVER, VICTORIA & EASTERN RY. CO. v. McDONALD.

Railways—Right of Way—Expropriation—Delay in Notice to Treat—Property Injuriously Affected—Compensation —Mandamus.

The approval and registration of plans, etc., of the located area of the right-of-way, under the provisions of the "Railway Act," and the subsequent construction and operation of the line of railway along such area, do not render the railway company liable to mandamus ordering the expropriation of a portion of the lands shewn within such area which have not been physically occupied by the permanent way as constructed. Fitzpatrick, C.J., and Davies, J., dissenting.

Appeal allowed with costs.

Ewart, K.C., for appellant.

G. E. Martin, for respondent.

CAP ROUGE PIER CO. v. DUCHESNAY.

Ex.] [DECEMBER 23RD, 1910.

Prescription—Interruption — Acknowledgment of Title — Uncertainty.

The appellants claimed prescriptive title of a part of the bed of a small river on which D., the respondents' *auteur,* was a riparian owner. D. had leased lands on the banks of the river to the appellants which, it was alleged, included the

property in dispute. In answer to the claim of prescriptive title the respondents produced, as their only evidence of interruption of prescription, a letter from the appellants to D. enclosing a cheque in payment of "use of your interest in Cap Rouge River this year," indorsed by D. acknowledging receipt of the funds, "with the understanding that the navigation of the river is not to be prevented."

Held, reversing the judgment appealed from (13 Ex. C. R. 116), Girouard and Idington, JJ., dissenting, that as D. had an interest in other portions of the river, the memorandum was too indefinite to serve as an interruptive acknowledgment defeating the title claimed by the appellants.

Appeal allowed with costs.

G. G. Stuart, K.C., for appellants.

Flynn, K.C., and *Paquet,* for respondents.

Arthur Fitzpatrick, for Trans. Railway Commissioners.

CANADIAN NEWS.

Duncan Dougall, who for over thirty-five years practised law in Windsor, died on the 30th December.

F. W. Russell, barrister, Tofield, Alta., and A. H. Russell, Vegreville, sons of the Hon. Mr. Justice Russell of the Nova Scotia Supreme Court Bench, have formed a law partnership at Red Deer, Alta., under the firm name of Russell & Russell.

Roderick Ashbaugh, barrister, Winnipeg, died on the 28th December.

C. R. Atkinson, K.C., for many years a prominent lawyer in Western Ontario, died at Chatham on the 24th December. He retired from active practice about ten years ago.

Warren C. Winslow, barrister, Chatham, N. B., died on the 25th December.

Wilson W. McLellan, barrister, Halifax, N.S., died on the 24th December.

F. C. Moffatt, barrister, Nelson, was recently married to Miss Ida Morris, of Vancouver, B.C.

At a special meeting of the Benchers of the Law Society of British Columbia the following were admitted to the British Columbia Bar and were sworn in as solicitors: J. S. Sutherland, H. D. Ruggles, Douglas Armour, H. S. Tobin, M. B. O'Dell, W. G. Anderson, J. L. Morrison, R. R. Perry, J. A. Clark, A. C. Mackintosh, S. B. VanKleeck, A. J. B. Mellish, N. F. Tunbridge, E. F. Sargent, H. W. Wightman, B. G. W. Smith, H. C. Clarke, A. Temple, R. Read, P. C. Morris, Alexander Campbell and J. S. Jamieson.

The following distinguished members of the Canadian Bench and Bar were knighted on New Year's day: Sir Allen Aylesworth, Minister of Justice, Sir C. J. Townshend, Chief Justice of the Supreme Court of Nova Scotia, and Sir George Gibbons, a member of the International Waterways Commission.

A. E. Bull, barrister, Vancouver, who for the past year has been police magistrate there, has resigned, his successor being H. S. Shaw, K.C., of Vancouver, formerly of Charlottetown, P. E. I. Mr. Bull has resumed private practice.

Edmund J. Moon has commenced practice at Radville, Sask.

Robt. McLeod, barrister, St. John, N.B., died on the 12th December.

The Regina Law Students held their annual banquet on the 15th December.

John Hodgins, barrister, Ottawa, died on the 9th December.

James Straton and Christopher A. Irvine have formed a law partnership at Saskatoon, under the firm name of Straton & Irvine.

A. N. Morgan, barrister, of New Liskeard, has removed to Montreal to accept the position of general solicitor for the Ontario division of the Bell Telephone Company.

Frank Ford, K.C., formerly Deputy Attorney-General of Saskatchewan, and Cecil B. F. Mount, barrister, Edmonton, have joined the Edmonton law firm of Emery, Newell & Bolton, which will hereafter be known as Emery, Newell, Ford, Bolton and Mount.

Augustine S. Hurd, K.C., of the law firm of Hurd, Fraser, Macdonald & Rugg, Sherbrooke, died on the 22nd December.

Joseph W. Weldon, advocate, Montreal, has withdrawn from the law firm of McGibbon, Casgrain, Mitchell & Weldon, and will in future practise alone.

The annual meeting of the Bar Association of the Moose Jaw Judicial District was held on the 9th December. The officers for the current year are as follows. President, G. E. Taylor, Moose Jaw; Vice-President, W. O. Smyth, Swift Current; secretary-treasurer, J. E. Chisholm, Moose Jaw. A banquet was held in the evening.

His Honour A. A. Carpenter, Judge of the District Court of the District of Macleod, Alta., has been transferred to the District of Calgary, His Honour Judge Mitchell having resigned.

J. J. Meagher has withdrawn from the law firm of Atwater, Duclos, Bond & Meagher, Montreal, intending to practise alone in the future.

The following were admitted to the Bar of New Brunswick on the 11th of November: R. S. Freeze, Sussex; E. C. Weyman, St. John, A. E. Pearson, Sussex; A. N. Vince, Woodstock; U. King, Petitcodiac; D. K. Hazen, St. John; H. Lunney, St. John; G. E. Logan, St. John; J. S. Tait, St. John; G. R. Long, St. John. Mr. Lunney expects to practise in Montreal, and Mr. Long in Vancouver, the other members practising at the addresses above given.

Harry S. Pritchard, barrister, Toronto, has entered into partnership with J. C. Kerr, barrister, Chatham, Ont., under the firm name of Kerr & Pritchard.

J. C. Lamothe and Camille Tessier, advocates, Montreal, have formed a law partnership under the firm name of Lamothe & Tessier.

On the 10th January, 1911, Peter O'Brien, formerly County Judge of Prescott and Russell, died in the ninety-first year of his age.

S. W. Field and J. I. Grover have become associated with Frank Denton, K.C., Toronto, the firm name being Denton, Grover & Field.

The Christopher Robinson Memorial Prize of $100 has been awarded to R. W. Hart, barrister, Toronto, by the Law Society of Upper Canada.

Messrs. Bull & Buchanan have opened a law office in North Vancouver.

At a meeting of the Benchers of the Law Society of Alberta, held on the 1st December, James Muir, K.C., was

elected President, C. F. P. Conybeare, K.C., Vice-President. The Finance and Library Committee are Messrs. Conybeare, Brown and Bennett. The members of the Education and Legislation Committee are Messrs. Biggar, Bennett and White, and those on the Reporting, Printing and Discipline Committee are Messrs. Walsh, Greene and McNeil. A general meeting of the Alberta lawyers will be held sometime during 1911.

John W. Hugill, formerly of the law firm of Lougheed, Bennett & Co., Calgary, has been admitted to the Alberta Bar.

J. H. David and G. A. Marsen, advocates, Montreal, have formed a law partnership there under the firm name of Marsen & David.

H. Colin Clark has commenced practice at Merrill, B.C.

His Hon. R. H. Myers is now Senior Judge of the County Court of Winnipeg.

H. W. R. Moore having withdrawn from the law firm of Bernard & Robertson, Victoria, B.C., will practise alone in that city.

R. P. Waddell, barrister, has commenced practice at Toronto.

C. M. Woodworth and A. R. Creagh, barristers, Vancouver, have formed a law partnership in that city under the firm name of Woodworth & Creagh.

A. C. Smith, formerly associated with Mr. Woodworth, has been appointed Registrar of Titles at Vancouver.

The officers of the Vancouver Law Students' Society for the ensuing year are as follows:—Hon. President, R. L. Reid; Hon. Vice-President, E. A. Lucas; President, R. L. Maitland; Literary Committee, Messrs. Faulkner, Lockwood and Duncan.

P. M. Cote is now connected with the Department of Justice at Ottawa.

A. L. Smith, barrister, Regina, has removed to Calgary, where he will practise in future.

J. H. Publow, formerly of the law firm of Ogilvie & Publow, Calgary, recently died in that town.

E. R. Richard, barrister, has commenced practice at Dorchester, N.B.

H. G. S. Heisterman has been admitted to partnership in the law firm of Bernard & Robertson, the new firm being known as Bernard, Robertson & Heisterman.

The law firm of Stuart & Lathwell, Calgary, has been dissolved, Mr. Lathwell continuing the present business.

Adam S. Johnston has joined the law firm of Whiteside & Edmonds, New Westminster.

At the annual meeting of the Perth County Law Library Association the following officers were elected:—President, G. G. McPherson, K.C.; Vice-President, J. C. Makins, K.C,; Sec.-Treasurer, Miss L. Sanderson.

H. S. Ross, K.C., of Nova Scotia, has been admitted to the Quebec Bar, and will enter the law firm of Perron, Taschereau & Co., Montreal.

At the annual meeting of the Elgin County Law Library Association held on the 10th January, the following officers were elected:—His Hon. Judge Ermatinger, President; J. M. Glenn, K.C., Vice-President; C. C. St. Clair Leitch, Secretary; W. L. Wickett, Treasurer. The latter has held the position of Treasurer for the past twenty years. Trustees, W. K. Cameron, T. W. Crothers, K.C., J. B. Davidson, Dr. Jas. H. Coyne, St. Thomas; E. A. Millar, Aylmer, and J. D. Shaw, Rodney. The Library has 2,058 books, 38 were added since the last annual report, 314 books were borrowed during the year, and not a single book is missing. Certainly a record amongst law libraries. A permanent catalogue has been compiled.

The following legal changes have taken place recently at St. John, N.B.: J. D. P. Lewin has become associated with J. A. Barry, and E. C. Weyman with S. A. M. Skinner.

Geo. McFadden has withdrawn from the law firm of Cate, Wells, White & Co., Sherbrooke, and will join the law firm of Camp & Ewing, Montreal.

At a meeting of the Saskatchewan Law Society held on the 5th of January, the following officers were elected: J. M. Patrick, President; and C. E. D. Wood, Vice-President.

Thos. J. Maloney, advocate, of Montreal, died on the 14th January.

W. B. Nicol, of the law firm of Nicol & Nicol, Toronto, died recently in that city.

Thomas J. Murray of the law firm of Murray & Locke, Winnipeg, has joined the Winnipeg law firm of Campbell & Pitblado.

Hon. Donald Morison, K.C., Minister of Justice for Newfoundland, and Chas. E. Hunt, have formed a law firm at St. John, under the firm name of Murray & Hunt.

T. E. Godson, K.C., Bracebridge, has been appointed Police Magistrate of the Porcupine District.

E. Sydney Smith, K.C., Stratford, has been appointed Local Registrar for the County of Perth.

McCrossan & Harper, barristers, Vancouver, have opened a branch office at Ladner in charge of W. N. Vaughan.

His Honour Judge Johnston, Senior Judge of the district of Algoma, died on the 16th of January, at Sault Ste. Marie. He was appointed to the Bench in 1890.

W. M. Rose has become partner in the law firm of McCraney, MacKenzie & Hutchison, Regina, and will be in charge of the office at Rosthern.

Patterson & George, barristers, Deloraine, Manitoba, have opened a branch at Waskada.

A law partnership has been formed at Antigonish, N.S., between R. P. Griffin and A. MacNeil, the firm name being Griffin & MacNeil.

F. J. Sutton of the New Brunswick Bar, and Thomas Hamilton, of the Irish Bar, have become members of the law firm of Leech & Leech, Winnipeg.

Wilford S. Boyd, barrister, who for the last five years has been with the law firm of Campbell, Pitblado & Co., Winnipeg, has withdrawn from that firm to practise alone.

The annual meeting of the Ottawa Bar Association was held on the 21st January, when the following officers were elected: President, Travers Lewis, K.C.; Vice-President, C. J. Bethune; Treasurer, M. G. Powell; Secretary, A. Gibson; Councillors, M. J. Gorman, K.C., F. H. Crysler, K.C., W. D. Hogg, K.C.. J. F. Warne and J. F. Orde, K.C.

J. A. McInnes, barrister, Vankleek Hill, has removed to Vancouver.

ADDITIONAL RULES OF THE SUPREME COURT OF JUDICATURE FOR ONTARIO, PASSED SINCE THE LAST (THIRD) EDITION OF HOLMESTED AND LANGTON, 1905.

Rule Passed 24th March, 1906.

1275. Notwithstanding the provisions of Rule 777, except in cases in which there is by Statute or by rule of a Court a local venue, an order of a Judge of the High Court determining the place of trial, whether made upon an original motion, or upon appeal from the Master in Chambers, or from a Local Judge or Local Master, and whether it change or confirm the venue as laid by the plaintiff, shall not be subject to appeal.

Rules Passed 28th September, 1907.

1276. Rule 999 is repealed and the following substituted therefor:

Upon the filing of the petition it shall stand referred, and shall be delivered or posted by the proper officer to the Referee named for that purpose.

1277. Rule 806 (1) be amended by adding:

"Where evidence is printed there shall be a headline on each page giving name of witness and stating whether the evidence is examination-in-chief, cross-examination, or as the case may be."

"All exhibits shall be grouped together and printed in chronological order."

And by adding to Rule 806 as sub-section (1a):

"(1a) Provided that in a case in which an appeal lies to His Majesty in His Privy Council, the appeal book may, by consent or by direction of a Judge on such terms as may seem just, be printed according to the regulations as to form and type in appeals to His Majesty in Council."

RULES PASSED 27TH MARCH, 1908.

(Promulgated 4th April, 1908.)

1278. (1) Consolidated Rules 777 and 1275 are repealed and the following subsituted therefor:

777. (1) A person affected by an order or judgment pronounced by a Judge in Chambers which finally disposes of an action may appeal therefrom to a Divisional Court without leave, by notice of motion to be served within four days, and made returnable within seven days after the order or judgment has been pronounced. The motion shall be set down at least one day before the same is made returnable.

(2) Except in cases in which a right of appeal is specially conferred by Statute or by Rule of Court, no appeal shall lie from any judgment or order of a Judge in Chambers, which does not finally dispose of the action unless by special leave of a Judge of the High Court other than the Judge by whom the judgment or order was pronounced.

(3) Such special leave shall not be given unless

(*a*) There are conflicting decisions by Judges of the High Court upon the matter involved in the proposed appeal, and

it is in the opinion of the Judge desirable that an appeal should be allowed; or

(*b*) There appears to the Judge to be good reason to doubt the correctness of the judgment or order from which the applicant seeks leave to appeal, and the appeal would involve matters of such importance that in the opinion of the Judge leave to appeal should be given.

(4) The application for leave to appeal shall be upon notice served within four days and returnable within seven days from the judgment or order, or within such further time as a Judge of the High Court may allow.

(5) If leave be given, the appeal shall be forthwith set down by the applicant upon the Divisional Court list and shall be heard by the Court without further notices.

(6) No appeal under this Rule shall be a stay of proceedings unless so ordered by a Judge of the High Court.

(7) These Rules shall come into force forthwith upon promulgation thereof.

RULES PASSED 27TH MARCH, 1908, UNDER THE CRIMINAL CODE.

1279. In all cases in which it is desired to move to quash a conviction, order, warrant or inquisition, the proceeding shall be by a notice of motion in the first instance instead of by *certiorari*, or by rule or order *nisi*.

1280. The notice of motion shall be served at least six days before the return day thereof, upon the Magistrate, Justice or Justices making the conviction or order, or issuing the warrant, or the coroner making the inquisition, and also upon the prosecutor or informant (if any), and upon the clerk of the peace if the proceedings have been returned to his office, and it shall specify the objections intended to be raised.

1281. Upon the notice of motion shall be endorsed a copy of Rule Number 1282, together with a notice in the following form, addressed to the Magistrate, Justice or Justices, Coroner or Clerk of the Peace as the case may be;

"You are hereby required forthwith after service hereof to return to the Central Office at Osgoode Hall, Toronto, the conviction (or as the case may be) herein referred to, together with the information and evidence, if any, and all things

touching the matter, as fully and as entirely as they remain in your custody, together with this notice.

Dated

To A. B.

Magistrate at (*or as the case may be*).

C.D.,

Solicitor for the applicant."

1282. Upon receiving the notice so endorsed, the Magistrate, Justice or Justices, Coroner or Clerk of the Peace, shall forthwith return to the Central Office at Osgoode Hall, Toronto, the conviction, order, warrant or inquisition, together with the information and evidence, if any, and all things touching the matter, and the notice served upon him with a certificate endorsed thereupon in the following form:

"Pursuant to the accompanying notice I herewith return to this Honourable Court the following papers and documents, that is to say:—

"1. The conviction (*or as the case may be*);

"2. The information and the warrant issued thereon;

"3. The evidence taken at the hearing;

"4. (*Any other papers or documents touching the matter.*)"

"And I hereby certify to this Honourable Court that I have above truly set forth all the papers and documents in my custody or power relating to the matter set forth in the said notice of motion."

1283. The certificate shall have the same effect as a return to a writ of *certiorari*.

1284. The notice shall be returnable before a Judge of the High Court of Justice for Ontario sitting in Chambers.

1285. The motion shall not be entertained unless the return day thereof be within six months after the conviction, order, warrant or inquisition, or unless the applicant is shewn to have entered into a recognizance with one or more sufficient sureties in the sum of $100 before a Justice or Justices of the County within which the conviction, order or inquisition was made or the warrant issued or before a Judge of the County Court of the said County or before a Judge of the High Court, and which recognizance with an affidavit of the due execution thereof shall be filed with the Registrar of the Court in which such motion is made or is pending, or unless the applicant is shewn to have made

the deposit of the like sum of $100, with the Registrar of the Court in which such motion is made with or upon the condition that he will prosecute such application at his own costs and charges without any wilful or affected delay and that he will pay the person in whose favour the conviction, order or other proceeding is affirmed his full costs and charges to be taxed according to the course of the Court in case the conviction, order or other proceeding is affirmed.

1286. The Judge shall have all the powers of the Court in the like matters and may order the production of papers and documents as he may deem necessary.

1287. An appeal shall lie from the order of the Judge to a Divisional Court if leave be granted by a Judge of the High Court.

1288. The Rule passed by the High Court on the 17th day of November, 1886, under the authority of 49 V. c. 49, s. 6 (D), and all Rules and parts of Rules inconsistent with the next preceding nine Rules are hereby repealed.

These Rules shall come into force on the first day of September next.

RULES PASSED 2ND MAY, 1908.

1299. Rules 1289 to 1298 inclusive, relating to *certiorari* proceedings passed on Friday, the 27th day of March, 1908, and which were published in the issue of the Ontario Gazette, of 4th April, 1908, are hereby declared to be superseded and inoperative by reason of the Act of the Ontario Legislature passed at its last Session embodying said Rules.

1300. Rule 1237 is hereby amended by adding thereto the words "and also in the Provinces of Alberta and Saskatchewan."

1301. Rule 168 is hereby repealed and the following substituted therefor:—

1301. (1) When a defendant is served within Ontario elsewhere than in a Provisional Judicial District, he shall appear within ten days, including the day of service.

(2) If served within a Provisional Judicial District, unless otherwise ordered under Rule 353, he shall appear within twenty days, including the day of service.

These Rules shall come into force forthwith.

RULES PASSED 19TH DECEMBER, 1908.

Rule 412 as enacted by Rule 1229 is hereby repealed and the following substituted therefor:—

1302. (1) Money shall be paid out of Court upon the cheque of the accountant, countersigned by the Registrar of the Court of Appeal, or by one of the Junior Registrars of the High Court of Justice, and the Finance Committee of the Supreme Court shall regulate the times during which such officers shall respectively perform that duty, and may make regulations as to the manner in which it shall be performed.

(2) This Rule shall take effect forthwith without being published in the Ontario Gazette.

1303. Ordered that the Rule 806 be amended by striking out the words "and in demy quarto form" in the third line, and the word "small" in the fourth line.

RULE PASSED 23RD APRIL, 1910.

(Promulgated 31st December, 1910.)

1304. Any condition precedent the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be, and subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case by the plaintiff or defendant shall be implied in his pleading.

RULES PASSED 24TH DECEMBER, 1910.

(Promulgated 31st December, 1910.)

1305. Rule 806, as amended by Rules 1277 and 1303, is hereby repealed, and the following substituted therefor:

(1) The Appeal Book shall, when a printed book is necessary, be printed in accordance with the rules in Schedule A hereto, and, unless these rules are complied with, shall not be received without the leave of a Judge.

(2) If the press has not been carefully corrected, the Court in its discretion may (*a*) disallow the cost of printing; (*b*) decline to hear the appeal; or (*c*) make such order as to postponement and payment of costs as may seem just.

(3) In the Appeal Book there shall not be any unnecessary repetition of headings and documents; and parts of

documents that are not relevant to the proper matter of the appeal, or are merely formal shall not be printed, but any document not printed shall be referred to in the appropriate place in the book.

(4) When one party objects to the printing of any document, or part of document, upon the ground that it is not necessary, and the other party insists upon it being printed, it shall be printed with a note mentioning that it is printed at the instance of that party, and if upon taxation it is found that the printing was unnecessary the cost of such printing shall be disallowed to him in any event and shall be paid by the party at whose instance it was printed.

(5) When a book is printed in pursuance of this rule upon an appeal to His Majesty in Council 30 copies, in all other cases 30 copies, in sheet form, shall be deposited with the Registrar for the use of the Court, in addition to eleven bound copies for the use of the Court.

SCHEDULE A.—RULES AS TO PRINTING

1. The book shall be printed upon good white paper, which shall be of good quality, not less than 40 pounds to the ream.

2. The sheet when folded and trimmed shall be 11 inches long and 8½ inches wide.

3. The type in the text shall be pica, and long primer shall be used in printing accounts, tabular matter and notes.

4. The number of lines on each page shall be 45, as nearly as may be, exclusive of headlines, each line 4½ inches in length, exclusive of marginal notes. Every tenth line on each page shall be numbered in the margin, and the other margin shall be one and one-half inches wide.

5. The books shall be bound in paper not less than 60 pounds to the ream, and the backs shall be reinforced with cloth.

6 In cases in which an appeal lies to His Majesty in Council, and in any other case in which the Court of Appeal or a Judge upon the application of either party shall so direct, marginal notes, such as are required upon an appeal to His Majesty in Council, shall be printed.

7. In other cases there shall be a headline on each page of evidence, giving the name of the witness and stating whether the evidence is on examination-in-chief, cross-exam-

ination, or as the case may be, and answers shall follow the questions immediately and not commence a separate line.

8. All exhibits shall be grouped, and be printed in chronological order.

9. At the beginning of the book there shall be an index setting out in detail the contents of the book in four parts, as follows:

Part 1. A statement of the case and each pleading, order or other document in chronological order, with its date.

Part 2. Each witness by name, stating whether for plaintiff or defendant, examination-in-chief or cross-examination, or as the case may be.

Part 3. Each exhibit, with its description, date and number in the order of filing.

Part 4. All judgments in the Courts below, with the reasons for judgment, and the name of the Judge delivering the same, and the reasons for and against appeal.

10. The name of the Court, Judge or Official appealed from shall be stated on the cover and title page.

11. The book shall contain the date of the first proceeding and of the delivery of the several pleadings, but the style of the cause shall not be repeated.

12. Disbursements reasonably and properly incurred for printing Appeal Books in the form prescribed by these Rules shall be allowed.

1306. Rule 748 and Form 78 are hereby repealed and the following enacted in lieu thereof:

748. The Master before he proceeds to hear and determine shall require an appointment according to Form No. 78 to be served upon all persons made parties before the judgment appearing to have any lien, charge or incumbrance upon the lands in question, subject to the plaintiff's mortgage, and shall in the notice to the other parties interested, required by Rule 658, state the names and nature of the claims of those so notified, and of those added under the provisions of Rule 746 as appearing to have a lien, charge or incumbrance upon the said lands. Such notice may be in the Form 78a.

Form 78. *Notice to parties by writ having incumbrances.*

(Court and Cause.)

Having been directed by the judgment in this action to inquire whether any person other than the plaintiff has any lien, charge or incumbrance upon the lands in question in

this action subsequent to the plaintiff's claim, and to take an account of the amount due to the plaintiff and any such person And it having been made to appear that you may have some lien, charge or incumbrance thereon you are hereby notified that I have appointed day, the day of next at my chambers in the Court House at at o'clock to proceed with the said inquiry and to determine the amount of the claim of the plaintiff, and of such incumbrancers as may come in and prove their claims before me.

If you fail to attend upon such appointment, and to prove your claim, the reference may proceed in your absence, and you will receive no further notice of the proceedings in this action, and you will be treated as disclaiming any lien, charge or incumbrance upon the said lands, and will stand foreclosed from any such claim.

Dated this day of 19 .

W. L., Master.

Form 78a. *Notice to original defendants other than incumbrancers.*

(Court and Cause.)

Having been directed by the judgment in this action to inquire whether any person other than the plaintiff has any lien, charge or incumbrance upon the lands in question in this action subject to the plaintiff's claim thereon

You are hereby notified that it has been made to appear to me that the persons named in the schedule hereto may have some lien, charge or incumbrance thereon, and I have, therefore, caused such of them as are not already parties thereto to be added as parties in my office, and have appointed day, the day of next at my chambers in the Court House at at o'clock, to inquire and determine whether the said parties have any such lien, charge or incumbrance, and to fix and ascertain the amount thereof, and the amount of the plaintiff's claim upon his security.

If you do not then and there attend, the reference will be proceeded with in your absence, and you will receive no further notice of the proceedings in this action.

Dated this day of 19 .

W. L., Master.

SCHEDULE.

Incumbrancer.		Nature of Claim.
E.g.	A. B.	Mortgage dated.
	C. D.	Execution.
	E. F.	Mechanic's Lien.

1307. Rule 777, as amended by Rule 1278, is further amended by adding the words "or matter" after the word "action," where it first occurs in subsection (1) of Rule 777.

THE ONTARIO BAR ASSOCIATION.

Minutes of the annual meeting of the Ontario Bar Association held in Convocation Hall, Osgoode Hall, Toronto, on the 28th day of December, A.D. 1910, S. F. Lazier. the President of the Association, being in the chair.

The minutes of the last annual meeting were read and confirmed.

The President then delivered the annual address.*

The President named the following as a nominating committee: F. E. Hodgins, K C.; George C. Campbell; A. E. H. Creswicke, K.C.; W. C. Mikel. K C., and A. Lemieux.

An address on Legal Education in Ontario was given by Charles Elliott.

The Hon. Mr. Justice Middleton then delivered an address on Legal Reform.

The report of the Treasurer, Geo. C Campbell, was then read shewing a balance on hand of $298.57.

The following reports of committees appointed at the last annual meeting were then read:

REPORT OF THE TARIFF AND PROCEDURE COMMITTEE.

The Tariff and Procedure Committee beg to report that they find that the Rules of Procedure, including Rules 1178 and 1179, will be revised during 1911, and they have practically arranged that the Committee, if reappointed, will, in conjunction with a committee of the Toronto Bar Associa-

* All addresses appeared in the January number of THE CANADIAN LAW TIMES.

tion, co-operate with the Commissioners with a view to render the practice and procedure more simple and modern. Suggestions to this Committee from the members of the profession will be most useful and will be studied and systematized before being sent to the Commissioners.

The first part of the Law Reform Act of last Session has not yet been proclaimed. The general opinion of the profession was against it, as weakening the authority and continuity necessary in an Appellate Court. This Committee believe that that opinion is still held, and that any increase in the number of Judges solely to constitute an additional Appellate Court is unnecessary. In addition to this the result of the transfer of so many cases from the High Court of Justice to the County Court under Part II. should be studied for a year or two before any further change is made.

FRANK E. HODGINS, Chairman.

REPORT OF COMMITTEE ON LAW REFORM.

The Committee on Law Reform makes the following recommendations: —

1. A Divorce Court should be established in Ontario with power to dissolve a marriage contract upon any of the grounds upon which a divorce may be decreed in England

2. Sections 3 and 10 of the Act respecting the registration of co-partnerships and business firms, R. S. O. c. 152, should be amended by requiring the declaration of co-partnership or of the trading by a person under a name or style indicating plurality of members in the firm, should be registered in the proper Registry Office as provided in the Act, within ten days after the formation of the partnership, or when such name or style indicating plurality of members of the firm shall be first used.

3. The Act respecting Master and Servant, R. S. O. c. 157, should be amended by fixing the notice to be given to terminate the service relation if the duration of the service relation is neither fixed nor to be inferred from the nature or object of the service.

Amendments proposed:—

(1) If the remuneration is payable:—

(*a*) By the day, notice may be given on any day for the following day.

(*b*) By the week, notice may be given to terminate only for the end of a calendar week. Such notice to be given at the latest on the first business day of such week.

(*c*) By the month, notice may be given only for the end of a calendar month; it shall be given at the latest on the fifteenth of the month.

(*d*) By quarters, or a year, or longer periods of time, notice may be given only for the end of a quarter, and only by giving six weeks' notice.

(2) The service relation of the persons who are engaged for the performance of services of a superior kind, such as managers, travellers, tutors, private secretaries, companions, may be terminated by notice only at the end of one calendar quarter, and only by giving six weeks' previous notice, even if the remuneration is payable by shorter periods than quarters.

(3) If the remuneration is not payable at stated periods of time the engagement may be terminated by giving two weeks' previous notice terminating at any time.

(4) Nothing in the preceding sections shall deprive the employer of the right to discharge a servant or employee for cause, without notice.

(5) On the termination of a service relation the servant or employee may demand from the master or employer a written testimonial as to the service relation and its duration. The testimonial shall on demand contain a statement as to the efficiency and conduct in the service or employment.

4. No person should be permitted to do conveyancing work without a license. A license to be granted only after passing an examination on conveyancing matters.

5. The procedure of the Surrogate Courts should be simplified by reducing the number of affidavits and other papers required on an application for probate or letters of administration, and the Surrogate Court tariff should be revised, and the fees for surrogate work increased.

6. The legal profession should be relieved from collecting a revenue for the Government by the purchase and use of law stamps, and by payment of other fees in connection with legal and other proceedings.

7. The interests of the public will be best served by filling all vacancies requiring legal knowledge and training by members of the legal profession only.

8. County Judges, magistrates, special examiners, and other judicial officers should be paid by salary only, and not by fees derived from matters brought before them.

9. Execution process should be made more effective especially in the Division Court.

10. A bankruptcy law should be enacted.

11. The old Chancery rule prohibiting a "clog" on an equity of redemption should be abolished.

12. That the fullest freedom of contract between solicitor and client as to charges to be made by the solicitor for services to be rendered should be permitted, and a block system of charges should be permitted.

Amendments to Practice and Procedure.

13. All actions should be commenced by delivery of a statement of claim. The writ of summons should be abolished.

14. A practice Judge should be appointed. A uniform hour should be fixed for the holding of Court and Chambers.

15. The rules regarding examinations for discovery should be amended as follows:—

(1) It should not be necessary to serve the party to be examined with a copy of the subpœna.

(2) Upon serving the solicitor for the party to be examined with a copy of the appointment for the examination two clear days before the examination, and upon payment of the proper conduct money to such solicitor, the party to be examined should be compelled to attend for examination and should be liable upon default of attendance in the same way as if service had been effected as required at present.

16. Within ten days after the delivery of the statement of claim, the parties to an action should be obliged to file their affidavits on production without any order.

17. There should be more uniformity in regard to the time within which certain procedures are to be taken:

(1) A defence to the statement of claim should be delivered in ten days after service of the statement of claim.

(2) Applications to the Court or a Judge should be made returnable after three clear days, unless by special leave.

(3) All applications to the Court should be by notice of motion.

18. Money paid into Court as security for costs should be paid out to the solicitor of the successful party.

19. New rules of practice should be framed dealing with *quo warranto* proceedings, mechanics' lien proceedings, *certiorari* proceedings, *habeas corpus* proceedings and reference.

20. A commission should be appointed to consider and report on the state of the law and practice, with a view to the uniformity and simplicity in practice and procedure, and that the Ontario Government be requested to appoint such a commission.

M. H. LUDWIG, Chairman.

REPORT OF HISTORICAL COMMITTEE.

Your Historical Committee beg to report that while they have not yet accomplished many actual results, they have by correspondence and otherwise awakened an increased interest in the minds of members of the Bench and Bar in the subject of the biographies of those eminent men—some of them makers of history—who have preserved the continuity of the high traditions of our profession and many of whom have added to their legal attainments the no less bright distinctions of literary ability and statesmanship. If history is philosophy teaching by examples—if history is the essence of innumerable biographies, then we are wasting an invaluable national asset—a part of our professional heritage and inspiration, by not perpetuating the testimony of those men of light and leading who have passed—or are passing—from among us and each of whom might truly have said "*non omnis moriar.*"

What a treasury of art in the photographs or portraits that might be collected of the pioneers of the past—the veterans of the present—and to them Osgoode Hall should open a gallery. What a vital and vitalizing harvest of human documents might be garnered in the letters and autograph manuscripts of men whose personality spoke in the days of storm and stress as in the years of peace! Friends and relatives would gladly contribute these for the general welfare, but safe keeping must be assured—and for these also Osgoode Hall should open a museum.

What a fertile field for a monthly article in the "Canadian Law Times," and the "Canada Law Journal," would be a series of "collections and recollections" reviving the

memories and words and deeds of men distinguished either for forensic ability—administrative capacity—or those gentler virtues—that unbought grace of life—that endeared them to all and transformed the arena of controversy and polemics into mellow good fellowship and mutual appreciation *reviving the past but also vivifying the present.*

The Law Society of Upper Canada must have among its more than century of records filed away many archives of great historical value, but the personal touch—the skilled research—of a man with his heart in his work, would be needed to bring them into the "gladsome light of modern jurisprudence." Could not an appropriation be made for this purpose? But meanwhile have we not among the Benchers or the officials some who, encouraged by the zeal of Sir Aemelius Irving—who has stemmed the tide of time—might do much to make available some at least of the lore of learning, incident, and experience, stored in the arcana of our time-honoured Society?

Military institutes have gathered from north, south, east and west, relics of compaigns, souvenirs of heroism, trophies of tragedy and triumph, to illustrate the chronicle of the drum—why should not we also form a nucleus of illustrations of peaceful patriotism and intellectual victories in connection with our own profession, many of whom too have been not merely empire road builders and bridge builders, but also loyal defenders (arms and the man) of altars, firesides and flag?

From L'Escarbot the lawyer, the right hand man of Champlain, the links of the chain are continuous and offer splendid opportunities for biographers yet to be. Nuggets of rich ore will surprise us in the most unpromising material, for the lives of members of our profession have been fertile and fruitful, virile and unique.

Whoever peruses Read's Lives of the Judges of Upper Canada will at once recognize the potentialities of the subject, for the margin has only been touched by facile pen.

The life of Sir John Beverley Robinson, C.B, by Major-General C. W. Robinson, strikes the keynote of what is possible. A letter to the chairman from the late Christopher Robinson, Q.C. (he that was gentle doing gentle deeds)—regarding his ancestors of the U. E. Loyalists, and copies of the Acts of Attainder passed against them, are among the first and most appreciated contributions which your Com-

mittee have secured. The Bay of Quinte District have also contributed personal reminiscences of Sir John A. Macdonald, Kirkpatrick, Wallbridge, Hagerman and others of the olden times. Relatives have promised short articles on Osler and McCarthy; but there are a hundred others. If we had a John Ross Robertson in our profession the supply (and the demand) would be inexhaustible. Not having him, let us divide the labour of love and learning, let us each tap the reservoir of reserve material, the reservoir of power, to which we may have or find access. We can all do our share on the legal circuit—the electric circuit—we can all be power horses on the line, and contribute to the true conservation of resources and energy, for mind and memory are still more than matter even in this ultilitarian age—by keeping alive the glowing embers from the storied realms of the past—"transfused to future use by power of thought," and we will do at least part of our share as factors in

> "The land of settled government,
> The land of just and old renown,
> Where freedom slowly *broadens* down
> From precedent to precedent."

And *personally* as we realize the full volume and significance of our Canadian past in connection with our zealous and jealous mistress of the Law, we will be more and more men of cheerful yesterdays and confident to-morrows, of stable equilibrium and high ideals.

> "What constitutes a *State*?
> Men who their duties know and know their rights,
> And knowing them dare maintain.
> And sovereign law, that State's collected will,
> Sits empress, crowning good, repressing ill."

W. N. PONTON, Chairman.

The meeting then adjourned until 2.30 p.m.

After adjournment an address was delivered by Sir Allen Aylesworth, Minister of Justice for the Dominion of Canada, on The Hague Tribunal.

W. N. Tilley, K.C., next addressed the meeting, confining his remarks to the personnel of the Court and the counsel engaged in the North Atlantic Fisheries Arbitration

Moved by N. F. Davidson, K.C., seconded by F. M. Field, K.C., that the thanks of the Association be extended to Sir Allen Aylesworth for his very able and interesting address. Carried.

The following report from the corresponding secretary was then read:—

Report of the Corresponding Secretary.

The report of the corresponding secretary, in addition to routine business of calling together the council and urging the various sub-committees and their chairmen to get busy with their respective duties, records the following:

In July last we were invited to send a delegate to the 33rd annual meeting of the American Bar Association, which was held at Chattanooga, Tennessee, on August 30th and 31st and September 1st. After a good many letters were written, Mr. F. M. Field, K.C., of Cobourg, a member of our council, undertook the mission and subsequently reported a pleasant and profitable visit with our brother lawyers to the south of us.

Since the last annual meeting two inquiries have been made for copies of our constitution for use in Manitoba and the west. So that it may be available and go into the hands of a large number of the profession, the editor of the Ontario Circuit Guide was good enough, without expense to the Association, to print the constitution and also the by-laws in his last number.

In arranging for speakers at the present annual meeting and banquet, correspondence has been had with many persons and letters of regret have been received from the following, among others: Theodore Roosevelt, Justice C. E. Hughes of the Supreme Court of the United States, Joseph E. Choate of New York, Frederick E. Wadhams, Sir James Whitney, Sir Charles Fitzpatrick, Isaac Campbell, K.C., of Winnipeg, etc.

We have now to appoint a delegate to attend the annual dinner of the New York Bar Association, which will be held in the City of Syracuse on 20th January, 1911.

R. J. Maclennan, Corresponding Secretary.

The Nominating Committee handed in their report, which was read by the President, and on motion was adopted by the Association, as follows:

Hon. President, E. F. B. Johnson, K.C.

President—Charles Elliott.

Vice-Presidents—W. C. Mikel, K.C., M. H. Ludwig, K.C., F. M. Field, K.C.

Recording Secretary—W. J. McWhinney, K.C.

Corresponding Secretary—R. J. Maclennan.

Treasurer—George C. Campbell.

Past Presidents—F. E. Hodgins, K.C., and S. F. Lazier, K.C.

Council:—Toronto Members: J. H. Spence, C. W. Kerr, Frank Denton, K.C., N. F. Davidson, K.C., F. W. Harcourt, K.C., the Presidents of the County Law Library Associations, and A. C. Boyce, M.P., K.C., J. E. Farewell, K.C., and Auguste Lemieux.

Moved by C. W. Kerr, seconded by Charles Elliott, that the papers and reports read to this meeting be referred to the Council to be dealt with as they may think fit. Carried.

Moved by F. E. Hodgins, K.C., seconded by F. M. Field, K.C., that a committee be appointed by the President to wait on the Attorney-General in order to arrange that a small amount be placed in the estimates to provide proper accommodation at Osgoode Hall for the members of the Bar outside of Toronto when attending Court there. Carried.

In the evening a most successful banquet was held at the King Edward Hotel, at which the President presided. The toast to the Bench was proposed by W. J. McWhinney, K.C., and replied to by Sir Charles Moss; the toast to the Bar was proposed by President Falconer of the University of Toronto, and replied to by R. C. Smith, K.C., of the Montreal Bar, and Judge Clearwater on behalf of the New York Bar. Hon. Mr. Justice Riddell proposed the toast to the press, the response being made by the Editor of "Saturday Night."

In proposing the toast to the Bar President Falconer of the University of Toronto spoke as follows:—

Those of you who belong to the legal profession, the toast that I am to-night to propose, probably are not aware of the feeling of trepidation with which a layman must undertake to propose such a toast as this to-night. When I was asked to do so an instinctive feeling made me inclined not to accede to the request, and I am afraid if I had realized by the most potent powers of my imagination the reception that might possibly be given to a speaker here to-night, the natural diffidence of a layman would have been so powerfully reinforced that someone else would have been asked to present this toast.

However, gentlemen, I have already learned several things since coming to this banquet. Before this I had realised to a certain extent that the training given to the average lawyer as he enters upon his profession is rigorous; but what I heard to-night leads me to believe that the half has not been told, and that nothing but the most extreme powers of self-restraint are possible for a gentleman who is to make such a success at the Bar as the gentleman who proposed the former toast.

There are various reasons, Mr. Chairman, why a layman approaches a body of lawyers with a good deal of fear. It seems to be something like an instinct. We are surrounded by such a web of legal statutes that we ordinary laymen never realize when we are breaking through some statute, and we have been taught to believe that in the law ignorance counts for nothing; therefore, if there be some skilled practitioner nearby we never know what to expect. But I think there is another reason. We always feel that we are in the presence of superiors. When you leave the halls of learning you become practitioners of the law and you undertake to practise law; that is to say, you are presumably the law keepers of the community in contrast to us; therefore, the respect that always comes to those who live up to their profession undoubtedly exercises a certain amount of restraint upon us who never know quite where we are. In addition to this the average layman outside looks upon the lawyer with a certain amount of fear, because he knows that many lawyers have ambitions, to a larger extent apparently than he has, in the direction of getting into the place, not only where laws are interpreted, but where laws are made; and I think you will discover that a common complaint is that the members of your profession have an undue amount of influence in the making of laws in the Legislative Chambers. If they were all as brilliant as the gentleman who delighted us this afternoon, they probably would not have the same fault to find. (Hear, hear). But I am afraid that the ordinary man looks at it from a point of view that you can hardly understand, seeing that you belong to this profession, and it is very difficult for anyone in a profession to understand the point of view of the person outside. Possibly the ordinary man is afraid of the legal practitioner in the legislature because he knows that with his astuteness, with his training and with his precision of speech, he will

draw an Act with such exactitude, such absolute precision, that there can be absolutely no difference of opinion as to its meaning; and there will be for the average people no means of escape. Would it not be far more to his advantage to have average people like himself draft his statutes so that in times of difficulty he might take refuge in their obscurity?

These, then, are some of the reasons why we outsiders come to you with a certain degree, if not of trepidation, at least with the feeling that we have to be on our guard. However, to-night, after getting rid of that natural diffidence and that early instinct, I think there is really a reason why, coming from the university, I should propose this toast, because, strange as it may seem in Toronto, it is one of the facts of history that law and the universities have been connected in the closest possible way from the beginning. Visitors to Toronto often ask how it comes to pass that in the University of Toronto there is no Faculty of Law, and they find that those who intend to follow the legal profession have to go down town and enter into another institution. Now, you know, gentlemen, at least I am going to assume you know, that long ago when the modern university was originated there were two or possibly three types. As far back as the twelfth century there was one great type represented by the University of Bologna—that of law. Bologna was from its inception a law university. The two great universities of the continent, setting forth the two sides of law, were Bologna, representing justice, transmitted and interpreted; Paris, representing faith, transmitted and interpreted in the form of law. University education entered upon the stage in the twelfth century, in which mental acuteness was called out, strange as it may seem, through the writings of jurists who introduced new methods of instruction. By means of question and answer they brought out the difference between the commentators and case writers, a process which as it continued degenerated, and you get the later scholasticism. Now, that early method of university teaching was fruitful and originated, as I have said, particularly in Bologna, and, if I am not mistaken, the greatest law school on this continent, if not in the Anglo-Saxon world, has turned to something of the same type of teaching. In Harvard Law School they have the case method, which, as I understand it, is largely a process of enabling the young lawyer to study by means

of question and answer. He prepares his case, states it, and has to defend it.

Now, if that is so it leads up to this, that the connection between the University and your profession is not only historically most intimate, but that to-day it should be continued, and for a variety of reasons. There are some qualifications that you require—and I am going to speak as an outsider. The first qualification, I believe, is precision of thought and of speech. Gentlemen, I am perfectly persuaded that there is nothing that will give you that precision of thought and speech to the same degree as the old language and literature studies of the university. You may say that the education is not practical. It is not practical because a multitude of people to-day do not stop to ask what practical means. The practical is that which disciplines your powers, so that from year to year instead of staling you will be increasing in your power. Language and the discipline of literature gives you the ability to discern shades of meaning and to translate the idea of one age into the idea of the modern age, to find its equivalent in the way that I believe cannot be equalled by any other study. The lawyer can never permit a severance of that literary method from his early preparation. Again, another of your necessities as lawyers, is the ability to arrive at principles. The danger of our modern education is that we are all filled with facts, and that we do not ask the meaning that is conveyed by facts. If you will allow me to refer to the address which I had the privilege of hearing this afternoon, you were there carried beyond facts into metaphysics, which is the principle or reality beyond the thing that you see. Such a speech as that shews you what your profession may in its ideals attain. It shall become not an average business method of settling details, but a profession that will carry you out beyond the fact into the interpretation of the fact, which is more or less universal and which gives it cogency and power. (Hear, hear, and applause). I cannot help thinking, Mr. Chairman, that the training in the philosophical department and in the political science department provides a method that prepares you for interpreting the meaning of things that underlies the appearance on the surface. To-day something was said —I do not suppose it was meant in any way of disrespect— but something was said about the metaphysical German

lawyer. I am inclined to believe, Mr. Chairman, that some of the greatest lawyers who have graced the English bench have been metaphysical Scotchmen, and others of them have been metaphysical Englishmen, trained in Oxford, and others of them have been mathematicians from Cambridge. In the discipline they had there they learned the meaning of principle and afterwards exemplified the power that that training had elicited from them. You only need to turn to those who adorn your profession to see that that training at least can justify itself; and this is one other element which I believe is brought out by a university education.

One of the means of success in every professional department, is the ability to grasp an idea the nearer you advance to it, and then knowing it clearly, to be able to define it. The difference in ability between men is often marked by their difference in vagueness and precision. The modern university with its scientific methods has introduced a new means of training, which results from the fact that as you understand the process whereby an idea or a fact has come to be what it is, you understand the meaning of that idea or that fact as never before. By this method or process you trace back step by step to the beginnings of things, and when you see the beginning of things and then have retraced from the beginning up through their development, you understand the idea as you could not have otherwise understood it. I am perfectly sure that many a principle in law is reached by that method of the developing of a case. As on an ocean voyage you may see in the horizon a blur and are undecided whether it is a cloud or land, you solve your difficulty as you approach it. The cloud begins to take definite form, then the details come out and then the land is before you.

Now, this historic method that is to-day so important in university training is, I believe, a magnificent discipline for those who are looking forward to law. If that is so, and if, as I have tried to shew, the connection between law and the universities in the past has been so intimate, surely in Toronto we should look forward to not a very distant day when this breach will be bridged over again and when we in the University of Toronto shall not have only a department to grant degrees, but also a teaching faculty, and when you, representing this Ontario Bar Association, will recognise that we in the university have some-

thing we can give you that you cannot to the same extent get while you are living separate. Probably that will commend itself to the judgment of the Ontario Bar before many years go by, because there is something abnormal in the division between the two. I am sure you cannot do without us and I am very sure we cannot be a fully rounded out and historic university until we possess, with as high a standard as any other, a faculty representing one of the oldest professions, and certainly a faculty that is germane to any conception of a university. We can do much for you. And you can do much for us. I feel further that with the claims that are opening up before you—claims that possibly in the rush of business to-day have not allowed you to see the great scope of your profession—we in the university may hold up ideals and standards before you greater than can be got anywhere apart from the university. Think of what international law, for instance, promises you. As you sat and listened this afternoon to the story of what has been done for Canada by international law, you may have thought what might be done in a great school of international law. If these opportunities which have been opened up for us are to be realised, for we hope that more and more war will cease and more and more there will be the appeal to reason led by legal men before the Courts of Arbitration, surely in Canada there should be a great school in which lawyers may be equipped through the resources of unified knowledge which can only be found in a great university. These men will then go out and take their places beside the other great lawyers of the world. Think not that I am in the slightest way saying anything against what has been done. But I believe that there is a future, and that future can never be fully entered upon until we come together again and the university and the practical teaching of law are more unified, when you round out our institution and when we enable you to carry yours to a higher standard.

It is with much pleasure I propose the toast to the profession.

OSGOODE HALL LIBRARY.

New Books: Constantineau, Treatise on the De Facto Doctrine, Toronto, 1910; Jarman, Treatise on Wills, 6th ed., London, 1910; Stimson, Popular Law Making, New York, 1910; Wilcox, Municipal Franchises, vol. I., Pipe and Wire Franchises, Rochester, 1910; Scottish Law Review, 1885-1909, Glasgow, 1885-1909.

Books Missing: Bower, Actionable Defamation, London, 1908; Jacobs, Railway Law, Montreal, 1909; Jenkyns, British Rule and Jurisdiction Beyond the Seas, Oxford, 1902; Macqueen, Husband and Wife, 4th ed., London, 1905; May, Fraudulent Conveyances, 3rd ed., London, 1908; Nellis, Street Railway Accident Law, Albany, 1904; Odgers, Law of Libel, 4th ed., London, 1905; Wallace & Williamson, Law of Patents, London, 1900; Wills, Circumstantial Evidence, London, 1902; Encyclopædia of Laws of England, 2nd ed., vol. 6, London, 1907.

The
Canadian Law Times.

VOL. XXXI. APRIL, 1911. No. 4.

UNITED STATES RIGHTS IN BRITISH BAYS.

Since the promulgation of the award of the Hague Court in the North Atlantic Coast Fisheries Arbitration between Great Britain and the United States much has been said and written concerning the fishing rights of the Americans in "Bays" as debated before and decided by that Tribunal; and as more or less confusion has been engendered by this extrajudicial discussion, it is desirable that an effort should be made to dispel such confusion by a careful examination of the official record in the case.

The renunciatory clause of the Treaty of 1818 reads as follows:—

"And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits; provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood and of obtaining water, and for no other purpose whatever."

By the Fifth Question submitted to the Hague Court, it was asked, "From where must be measured 'the three marine miles of any of the coasts, bays, creeks or harbours' referred to in the said Article?"

The parties to the submission had no difficulty in agreeing that in the case of unindented coasts the three miles should be measured "from the shore line at low tide." But what about the "Bays?" Must the construction of the

renunciation article be, as the United States argued, the same in bays as on other parts of the coast, or must the proscribed area begin, as argued by Great Britain, three miles from a line drawn across the waters of the bay from headland to headland? That was the *crux judicum* arising under Question V. of the submission; and it is obvious that its solution must have a very important bearing in International law and practice.

The contention of Great Britain before the Hague Court was that the phrase used in the renunciation clause "bays of . . . His Britannic Majesty's dominions" was to be understood in a geographical or cartographical sense; in other words that it was referable only to such bodies of water as were defined or shewn as "bays" on maps and charts at the date of the treaty; or (and this was a subsidiary argument presented with much force by Sir Robert Finlay and Mr. Ewart), if the phrase demanded interpretation in a juristic sense, that the only intelligible principle enunciated by writers on International law was that of Grotius, namely, that a bay was not to be known by the width of its headlands alone, but by the proportion that the width of its headlands bore to the extent of coast line within the headlands, and that this principle should be applied to the case. The contention of the United States was that the phrase in question must be read as including only those bays which were under the territorial sovereignty of Great Britain at the time of the treaty; and that waters were "territorial" only if the headlands were six miles or less apart.

Recognising the feebleness of this interpretation as a matter of law, counsel for the United States had recourse to the conduct of the parties under the treaty, asserting that Great Britain had never in practice maintained the interpretation of the treaty asserted before the Tribunal, but on the contrary had always manifested a disposition to concede what the United States had claimed. Unfortunately, there was a great deal of truth in the assertion. And this brings us to a survey of the dealings of the parties under the treaty down to the time of the submission to the Hague Tribunal.

No difficulties arose between the parties to the Treaty until about the year 1839, when the mackerel began to disappear from the United States coast, and the fishermen of that

country sought access to the bays along the British American coast where these fish could still be had in large quantities. Asked by their fishermen concerning the right to fish in British American bays, the first answer made by the United States Government was to furnish them with a copy of the treaty. This was followed by the Government sending Lieutenant Payne out to the fishing grounds to ascertain what the fishermen were doing, and he found that they were of the opinion that they could fish in any of the bays in question so long as they did not go within three miles of the coast of such bays. This view he reported to his Government. Nothing, however, was done until 1841 when Mr. Stevenson, the United States ambassador at London, was directed to present the matter to the attention of the British Government. Strangely enough Mr. Stevenson, instead of advancing the views of his Government as to the proper limits of exclusion in respect of bays, informed the British authorities that the United States fishermen thought so and thus about their rights, and then offered some argument in support of what Mr. Ewart tersely characterised as "*the fishermen's idea.*" Into that view the "territorial" theory did not enter. Mr. Stevenson's communication remained unanswered by the British Government; but the opinion of the law officers was taken, and it negatived the fishermen's contention. Nothing further appears to have been done until the seizure in the Bay of Fundy of the United States fishing vessel, "Washington," in 1843. Thereupon an exchange of very important diplomatic notes ensued. Mr. Everett, on behalf of the United States, while apparently prepared to admit the validity of the principle of construction put forward by the British Government, argued against its application to the Bay of Fundy. In the end Lord Aberdeen, on the 13th of March, 1845, although asserting the application of the British contention to the Bay of Fundy, assented to a relaxation of the principle in favour of United States fishermen in that body of water. Before doing so, however, he had communicated with the Governor of Nova Scotia, who agreed that as Mr. Everett had admitted the validity of the British contention as a whole, a relaxation of it might be permitted as to the Bay of Fundy, "provided it led to no other of a like nature."[1] However, the concession had been

[1] B. C. A. 139.

strongly opposed in the Executive Council of Nova Scotia, Mr. J. W. Johnston, the Attorney-General, declaring that it "would be viewed with feelings of deep regret and disappointment in this colony, heightened by the consideration that the arguments urged by the American Minister although now confined to the fisheries of the Bay of Fundy are calculated to be pressed to consequences yet more extended; and little hope will be entertained, should they be allowed to be successful now, but that, as occasion may offer, these arguments will be renewed and directed to other attacks upon the system under which the fisheries of this province can only be protected from injury by the American fishermen."[2] In this manner was the right to exclude the American fishermen from the Bay of Fundy surrendered; and, as foretold by Mr. Johnston, the United States lost no time in urging the extension of the concession to all other bays.[3] The British Government was prepared to yield further, but before doing so the Colonial Secretary addressed the following communication to the Governors of Nova Scotia and New Brunswick: "I have to acquaint your lordships that, after mature deliberation, H. M. Government deem it advisable to relax the strict rule of exclusion exercised by Great Britain over the fishing vessels of the United States entering the bays of the sea on the B. N. American coasts. H. M. Government, therefore, henceforward propose to regard as bays, in the sense of the treaty, only those inlets of the sea which measure from headland at their entrance the double of the distance of three miles, within which it will be prohibited to the fishing vessels of the United States to approach the coast for the purpose of fishing."[4]

To this proposal of further surrender the colonies responded in such vigorous terms of disapproval that the British Government changed its purpose, the Colonial Secretary advising the Governors of the two provinces (17th Sept., 1845) that the intention of making further concessions had been abandoned.[5]

During the period that intervened between 1845 and the date of the Reciprocity Treaty of 1854, what the British

[2] B. C. A. 139.
[3] B. C. A. 139.
[4] B. C. A. 146.
[5] B. C. A. 51.

naval instructions were may be gathered from the following:—

"The vessels employed under my orders in the Gulf have already instructions to exercise the utmost moderation; to prefer warning to seizure; and are told, as last year, to drive away, not to actually seize, beyond three miles from shore, except in the last resort, in case of determined and contumacious encroachment in what are clearly bays of our provinces."[6]

In the year 1852, the British Government, urged thereto by the colonies, determined to exercise greater vigilance in the enforcement of her views under the Treaty of 1818, and Mr. Webster, Secretary of State for the United States, published a notice (19th July, 1852) to the United States fishermen in which he seemingly admits the validity of the British contention as to bays, and intimates that the fishermen were suffering injury by reason of the "oversight" of the United States negotiators in 1818. Mr. Webster seized upon the idea of a reciprocity convention as a way out of the loss and difficulty occasioned to the fishermen by the renunciation clause in the Treaty of 1818. Mr. Webster died before the elections of 1863, and Mr. Marcy was chosen Secretary of State in that year. Then the United States Government reverted to the "fishermen's idea" mentioned above.

During the Reciprocity Treaty period (1854-1865) an arbitration between the two countries took place with reference to the demand of the United States for damages because of the seizure of the "Washington" in the Bay of Fundy, above referred to. The decision of the umpire (Mr. Bates) was adverse to the British contention—that is, the bay was held not to be one within the meaning of the Treaty of 1818. It cannot be known what effect Lord Aberdeen's concession in 1845 had upon the decision of the umpire, but no doubt its influence upon his mind was considerable.

At the date of the determination of the Reciprocity Treaty (1865) the nature of the naval instructions had again to be considered, and once more we find the British Government disposed to make concessions to the Americans, while not abandoning their legal contention as to the proper construction of the treaty. On the 12th April, 1866, Mr.

[6] B. C. A. 202.

Cardwell (then Colonial Secretary), reserving the question of abstract right, instructed the naval authorities that United States fishermen "should not be interfered with either by notice or otherwise, unless they were found within three miles of the shore, or within three miles of a line drawn across the mouth of a bay or creek which is less than ten geographical miles in width, in conformity with the arrangement made with France in 1839. American vessels found within these limits should be warned that by engaging, or preparing to engage, in fishing, they will be liable to forfeiture, and should receive the notice to depart which is contemplated by the laws of Nova Scotia, New Brunswick and Prince Edward Island, if within the waters of one of these colonies under circumstances of suspicion. But they should not be carried into port except after wilful and persevering neglect of the warning which they may have received; and in case it should become necessary to proceed to forfeiture, cases should, if possible, be selected for that extreme step in which the offence of fishing has been committed within three miles of land."

"Her Majesty's Government do not desire the prohibition to enter British bays should be generally insisted on, except where there is reason to apprehend some substantial invasion of British rights."[7]

Now while this possibly goes to the limit of quixotism in making matters easy for a neighbour with predatory designs upon one's larder, still there is no abandonment in law of any rights arising under the Treaty.

Be this as it may, the colonies were anxious that the United States should be strictly limited to their treaty rights. A fair bargain had been made by the Reciprocity Treaty of 1854. The United States had cancelled that treaty in 1865. Why then should concessions be made to them? So argued the colonies; but the United Kingdom was being called to account by the United States in the "Alabama" affair, and, *ut pignus amicitiæ*, the Colonial Secretary insisted upon the colonies continuing to the American fishermen the benefits enjoyed by them under the cancelled treaty, upon payment of a nominal license fee of 50 cents a ton. The following extract from an order of the Governor-General in Council, dated 28th July, 1871, throws an

[7] B. C. A. 222.

interesting light upon the temper of the Canadians as a whole at the time they were required to acquiesce in this policy of concession: "Reference to the correspondence will prove that the license system was reluctantly adopted by the Canadian Government as a substitute for the still more objectionable policy pressed upon it by Her Majesty's Government."

So far as the province of Nova Scotia was concerned she, at first, point blank refused to assent to the concession, and the Provincial Government was disciplined by the Colonial Secretary (May 26th, 1866) in the following terms:—

"I must distinctly inform you that in a matter so intimately connected with the international relations of this country, Her Majesty's Government will not be disposed to yield their own opinion of what is reasonable to insist upon, nor to enforce the strict rights of Her Majesty's subjects beyond what appears to them to be required by the reason and justice of the case."[8]

The province thereupon dutifully withdrew her opposition, and the license system went into operation for a brief period. It was terminated in 1870, because the United States fishermen, with few exceptions, ceased to apply for licenses. Two reasons accounted for this: 1st the amount of the license fee had been raised; and 2ndly, those who had no license were none the worse so far as fishing privileges were concerned.

In 1870 the British Government shewed a disposition to make even more munificent concessions to the United States than had been previously made. While still adhering to their construction of the treaty as a matter of law, they conceded, by their naval instructions, more than had up to that time been asked, namely, that not only should no seizures be made for fishing within three miles of the land (whether in a bay or not) but not even then, unless the capture itself could be made within the same limits.[9] This policy was arrived at without any consultation whatever with the Canadian Government, and instructions embodying it were communicated to the Governor-General (30th April, 1870) with the following counsels of obedience:—

[8] U. S. C. A. 577.
[9] B. C. A. 231, 8, 9.

"H. M. Government do not doubt that your Ministers will agree with them as to the propriety of these instructions, and will give corresponding instructions to the vessels employed, etc."[10]

After some demur, Canada accepted the situation, and amended her naval instructions accordingly; but shortly afterwards sent Sir Alexander Campbell to England to discuss this and other matters with the Colonial Secretary. As a result of his mission, Sir Alexander was able to report as follows (10th Sept., 1870):—

"Lord Kimberley admitted that the time had come when Canadians might reasonably expect that the state of things anterior to the Reciprocity Treaty should be reverted to, or that some other definite arrangements with the Americans on the subject should be arrived at."

"The policy of conciliation had been fully tried and we ceased to expect anything from the Americans from it. We thought the only course now open to us was to ask the Imperial Government to fall back upon the rights which we enjoyed and maintained anterior to the Reciprocity Treaty, and I was directed to request this at the hands of the Government."[11]

In 1871 came the Treaty of Washington, by which, for supposed Imperial reasons, and in consideration of a money payment, the colonial fisheries were opened to the United States fishermen. To this arrangement Sir John Macdonald made a most strenuous but unsuccessful resistance. That treaty, however, came to an end in 1885, and in 1886 the naval instructions of 1870 were re-issued, negotiations then being opened up looking to a new treaty.

In November 1886, the United States proposed a settlement of the bay question under the Treaty of 1818 upon the basis of a headland width of ten miles,[12] but Canada declined to agree;[13] and finally a commission was appointed to consider all questions in dispute. Upon this commission Mr. Joseph Chamberlain was the chief British representative, and Canada was represented by Sir Charles Tupper. The commission met in Washington in 1888, and its deliberations, in which the Canadian representative's stand

[10] U. S. C. A. 592.
[11] U. S. C. A. 624.
[12] B. C. A. 359.
[13] B. C. A. 401, 413.

for the maintenance of colonial rights received the hearty support of Mr. Chamberlain, resulted in a treaty which the United States Senate failed to ratify. Canada found herself unable to enforce her views, and her bays remained open to the incursions of United States fishermen, and would in all probability have remained so for an indefinite period, had not Newfoundland, by standing on her rights, brought about the recent arbitration at the Hague, with such important results to all concerned.

It is worthy of remark that the settlement of the dispute as to bays arrived at by the unratified treaty of 1888 is almost identical in terms with the disposition of the question by the award of the Hague Tribunal, actual reference being made by the Tribunal to this treaty in stating the grounds of their decision. As Canada is quite satisfied with that award, the facts disclose that her interests did not suffer at the hands of the British representatives at Washington in 1888, whatever may be said about the aptitude for concession on the part of the Imperial authorities in the earlier stages of the controversy.

The answer of the Tribunal to Question V. was:—

"In case of bays, the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three miles are to be measured following the sinuosities of the coast."

In arriving at this conclusion the Tribunal accepted neither the British contention that the renunciation clause of the Treaty applied to all bodies of water geographically known as bays, nor the United States contention that the line of exclusion only began three miles from the shore. It, however, adopted the subsidiary contention of Great Britain based on the dictum of Grotius above mentioned, confining its application to bodies of water having certain characteristics. The Tribunal naturally recognised that its declaration would leave the practical application of the principle unsettled. It therefore recommended the parties to accept certain delimitations, and in other bays to draw the line of exclusion where the bays narrowed to ten miles in width. In fixing this delimitation the Tribunal followed in almost identical words the agreement arrived at by the two countries in the unratified Treaty of 1888.

Such an examination as we have been able to give the subject satisfies us beyond all doubt that not only have Canada and Newfoundland emerged with success from this controversy with the United States, but that their exclusive rights in the coast fisheries are now put beyond all chance of detriment through mistaken displomacy.

MEMORANDUM OF DECISIONS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL RESPECTING THE POWERS OF DOMINION AND PROVINCIAL LEGISLATURES IN CANADA FROM THE DATE OF CONFEDERATION TO 31ST DECEMBER, 1910.

This synopsis is contributed in the hope that it may serve for convenient reference to reported cases decided by the Judicial Committee of the Privy Council in cases where the constitutional limitations of the "British North America Act, 1867," and the other Imperial Statutes respecting the distribution of legislative and administrative powers and functions of Parliament and the local legislatures in Canada have been in issue, from the date of Canadian Federation, 1st July, 1867, to the end of the year, 1910. It may also assist in giving some idea of the trend of judicial opinion in relation to the Constitution of Canada as modified from time to time during those years in the changing personnel of the Judicial Board of the Privy Council.

1873 Reg. v. Coote, L. R. 4 P. C. 599.

Dominion may repeal statute of Lower Canada respecting new trials in criminal cases.

1874 Union St. Jacques v. Belisle, L. R. 6 P. C. 31.

Province may legislate for relief of financially embarrassed company to avert insolvency.

1875 Dow v. Black, L. R. 6 P. C. 272.

Province of New Brunswick may authorise issue of debentures in aid of railway extending beyond limits of province, by a company incorporated for that pur-

pose prior to 1st July, 1867, *Queen* v. *Dow*, (1 Pugs. 300), reversed.

1876 Thebèrge v. Landry, 2 App. Cas. 102.

Province may give finality to judgment of a controverted election Court in respect to provincial elections. The royal prerogative of granting leave to appeal from the final judgment in such a case should not be exercised.

1877 Johnston v. St. Andrews Church, 3 App. Cas. 159.

The royal prerogative to grant leave to appeal from Supreme Court of Canada is preserved by the Dominion Act establishing that Court.

1878 Attorney-General v. Queen Ins. Co., 3 App. Cas. 1090.

Province cannot impose indirect tax on contracts of insurance by a statute which is virtually a "Stamp Act."

1880 Bourgouin v. Montreal, Ottawa & Occidental Rway. Co., 5 App. Cas. 381.

Province cannot validate deed by a federal railway company transferring its railway and agreeing that the company should be dissolved; an Act of the Parliament of Canada is essential for such purpose.

1880 Cushing v. Dupuy, 5 App. Cas. 409.

Dominion may declare judgment of Court of Appeal in matters of insolvency final and not subject to right of appeal allowed by provincial statute.

1881 Citizens Ins. Co. v. Parsons, 7 App. Cas. 96.

Province may regulate contracts of fire insurance made by federal companies. Dominion may incorporate companies to do business in more provinces than one.

1882 Dobie v. Temporalities Board, 7 App. Cas. 136.

The powers of Ontario and Quebec to repeal or alter statutes of old Province of Canada are precisely coextensive with their legislative powers under B. N. A. Act, 1867. Dominion only can repeal or modify a statute creating a corporation having its existence and

rights in both provinces. The provinces cannot do so either individually or by conjoint legislation.

1882 Western Counties Rway. Co. v. Windsor & Annapolis Rway. Co., 7 App. Cas. 178.

On 1st July, 1867, Dominion became the owner of provincial government railways, but for no larger interest therein than, at that date, belonged to the province. Doubtful if Dominion can extinguish rights acquired over such railways prior to Confederation.

1883 Russell v. The Queen, 7 App. Cas. 829.

Dominion may suppress liquor traffic throughout Canada.

1883 Attorney-General v. Mercer, 8 App. Cas. 767.

Lands escheating for defect of heirs belong to province.

1883 Hodge v. The Queen, 9 App. Cas. 117.

Matters which, in one aspect and for one purpose, are subject to provincial authority may in another aspect and for another purpose be subject to the Dominion. Province may enact liquor laws in the nature of police and municipal regulations which do not interfere with the general regulation of trade or commerce. In such matters province may authorise regulations creating offences and annexing penalties including imprisonment with or without hard labour.

1883 Colonial Building and Investment Assn. v. Attorney-General of Quebec, 9 App. Cas. 157.

Dominion may incorporate companies to purchase and sell lands in more provinces than one.

1884 Attorney-General of Quebec v. Reed, 10 App. Cas. 141.

Province cannot impose stamp duty on contentious proceedings of which the ultimate incidence is uncertain.

1885 Riel v. The Queen, 10 App. Cas. 675.

In providing for the "administration, peace, order and good government" of its "territories," Dominion has the utmost discretion and may, to attain these

objects, depart from rules of criminal procedure as known and practised in England.

1886 Exchange Bank v. The Queen, 11 App. Cas. 157.

Dominion is bound by the Codes of Lower Canada and cannot claim priority over other ordinary creditors of a bank in liquidation.

1887 Bank of Toronto v. Lambe, 12 App. Cas. 575.

Province may tax banks and insurance companies carrying on business within the province.

1888 Redfield v. Corporation of Wickham, 13 App. Cas. 467.

Railways declared subject to Dominion Act may be seized and sold in execution under *fi. fa.* for debts of the company issued from a court of the province to the jurisdiction of which it was formerly subject.

1888 St. Catharines Milling and Lumber Co. v. The Queen, 14 App. Cas. 46.

Province has entire beneficial interest in Crown lands within its boundaries not vested in the Dominion by sec. 117 of the B. N. A. Act, 1867. The power of Dominion over Indian Reserves is not inconsistent with the beneficial interest of the province.

1888 Attorney-General of British Columbia v. Attorney-General of Canada, 14 App. Cas. 295.

Province by prerogative right, holds the beneficial interest in the precious metals in, upon and under "public lands" until expressly transferred. (See *Esquimalt and Nanaimo Rway. Co.* v. *Bainbridge* (1896), A. C. 561.)

1892 Maritime Bank v. Receiver-General (1892), A. C. 437.

Provincial property and revenues are vested in the Crown as the sovereign head of each province. Province of New Brunswick is entitled to be paid the amount of public moneys deposited in an incorporated bank in preference to other depositors as it is a Crown debt to which the prerogative attaches.

1892 City of Winnipeg v. Barrett (1892), A. C. 445.

Province of Manitoba may authorise that one local rate should be levied upon Protestants and Roman

Catholics alike for the whole of a tax for the support of non-sectarian schools.

1893 Tennant v. Union Bank (1894), A. C. 31.

Dominion may legislate in regard to transfer of warehouse receipts to banks.

1893 Attorney-General of Ontario v. Attorney-General of Canada (1894), A. C. 189.

Province may make provisions ancillary to bankrupt law which do not conflict with existing bankruptcy legislation of Dominion.

1895 Brophy v. Attorney-General of Manitoba (1895), A. C. 202.

Governor-General in Council may make remedial orders for relief of Roman Catholics in respect of taxation for support of non-sectarian schools in Manitoba.

1895 Casgrain v. Atlantic and N. W. Rway. Co. (1895), A. C. 282.

Dominion may empower a railway company to close, occupy and use a public lane with the consent of the municipality.

1896 Attorney-General of Ontario v. Attorney-General of Canada (1896), A. C. 348.

Province may prohibit liquor traffic within the province. Prohibition inoperative where Dominion Act is adopted.

1896 Fielding v. Thomas (1896), A. C. 600.

Legislature of Nova Scotia may adjudicate that wilful disobedience to its order is a breach of privilege and contempt, and may punish that breach by imprisonment.

1897 Attorney-General of Canada v. Attorney-General of Ontario (*Indian Lands*) (1897), A. C. 199.

The beneficial interest in Indian Reserves in Upper Canada is vested in the Province of Ontario in virtue of sec. 109 B. N. A. Act, 1867, free from any charge thereon for increased annuities to the Indians under treaties. Dominion must pay these amounts, with re-

course to provinces of Ontario and Quebec under secs. 111, 112, B. N. A. Act, 1867, in same manner as original annuities.

1897 Brewers and Malters Assn. v. Attorney-General of Ontario (1897), A. C. 231.

Province may license brewers and distillers to sell by wholesale within the province.

1897 Grey v. Manitoba and N. W. Rway. Co. (1897), A. C. 254.

Provincial court cannot order sale of a division of a federal railway, part of section being within and part part without its jurisdiction.

1897 Attorney-General of Canada v. Attorney-General of Ontario (1898), A. C. 247.

Province may confer precedence on members of provincial bar.

1898 Attorney-General of Canada v. Attorney-General of Ontario, Quebec and Nova Scotia (1898), A. C. 700.

Entire rivers are not transferred to Dominion under sec. 108 of B. N. A. Act, but improvements only of rivers and lakes. Transfer of "public harbours" is not limited to those on which public works are made. Dominion may legislate respecting constructions in or over navigable waters.

Provinces own the fish, but fishing regulations may be made by Dominion. A tax by way of license may be imposed by both. Dominion cannot grant exclusive rights in province. Province cannot regulate manner of fishing.

1899 Canadian Pacific Rway. Co. v. Notre Dame de Bonsecours (1899), A. C. 367.

Dominion has exclusive power to regulate construction, repair and alteration of federal railways. Province cannot interfere with the structure, but may prescribe the cleaning of the railway ditch.

1899 Union Colliery Co. v. Bryden (1899), A. C. 580.

Province of British Columbia may not prohibit Chinamen (aliens or naturalized) from employment in mines.

1899 Madden v. Nelson and Fort Sheppard Rway. Co. (1899), A. C. 626.

Province cannot impose liability for cattle killed on federal railway.

1902 Attorney-General of Manitoba v. Manitoba License-Holders' Assn. (1902), A. C. 73.

Province may prohibit liquor traffic within the province.

1902 Hull Electric Co. v. Ottawa Electric Co. (1902), A. C. 237.

Province may authorise grant of monopoly in favour of a local undertaking, excluding competition of rival traders for a limited time.

1902 Dominion Cotton Mills Co. v. General Engineering Co. of Ontario (1902), A. C. 570.

A British patent of invention is a foreign patent within the meaning of "Canada Patent Act."

1902 Ontario Mining Co. and Attorney-General of Canada v. Seybold and Attorney-General of Ontario (1903), A. C. 73.

Province of Ontario has exclusive right to dispose of surrendered Indian lands. Dominion cannot appropriate such lands for Indian Reserves without consent of province. Dominion has exclusive legislative authority but no proprietary rights therein.

1902 Cunningham and Attorney-General of British Columbia v. Tomey Homma and Attorney-General of Canada (1903), A. C. 151.

Dominion has exclusive jurisdiction as to naturalization, but province may determine what privileges should be attached to it.

1903 Algoma Rway. Co. v. The King (1903), A. C. 478.

Dominion may impose duty on foreign-built ship brought into Canada.

1903 Graves & Co. v. Gorrie (1903), A. C. 496.

Imperial Fine Arts Copyright Act, 1862, confers copyright in pictures, drawings and photographs in British dominions.

1903 Clergue v. Murray (1903). A. C. 521.

Dominion may prohibit appeals from judgments of Supreme Court of Canada except by leave of His Majesty in Council.

1903 Attorney-General of Ontario v. Hamilton Street Rway. Co. (1903), A .C. 524.

Province cannot legislate to prevent profanation of "Lord's Day;" an infraction of such a statute is an offence against criminal law.

1905 Attorney-General of Prince Edward Island v. Attorney-General of Canada (1905), A. C. 37.

Dominion may reduce the number of representatives in House of Commons from New Brunswick and Prince Edward Island.

1905 City of Toronto v. Bell Telephone Co. (1905), A. C. 52.

Dominion may authorise a company of which the business extends beyond one province to make use of municipal highways for the purposes of that business. Province cannot interfere with the exercise of those powers by such a company.

1905 Central Ontario Rway. Co. v. Trusts & Guarantee Co. (1905), A. C. 576.

Dominion may authorise sale of a federal railway in satisfaction of mortgage bonds.

1905 Re "Lord's Day Act." Privy Council refused leave to appeal, 26th July, 1905, (35 Can. S. C. R. 581.)

Dominion may prohibit work, labour, business and the holding of sports for gain on Sunday. (Held by judgment from which leave to appeal was sought.)

1906 Attorney-General of British Columbia v. Canadian Pacific Rway. Co. (1906), A. C. 204.

Dominion may authorise appropriation of a foreshore for the purpose of a federal railway and the obstruction of rights of passage across it.

1906 Attorney-General of Canada v. Cain and Gilhula (1906), A. C. 542.

Dominion may expel aliens from Canada and impose the necessary extra-territorial constraint for the purpose of executing that power.

1906 Attorney-General of British Columbia v. Attorney-General of Canada (1906), A. C. 552.

Imperial Military Reserves transferred to the Dominion do not vest in provinces in virtue of sec. 117 B. N. A. Act, 1867, nor do they vest in Dominion in virtue of sec. 108 of that Act.

1907 Grand Trunk Rway. Co. v. Attorney-General of Canada (1907), A. C. 65.

Dominion may prohibit federal railways from "contracting out" of liability for injuries to employees.

1907 Brothers of Christian Schools v. Minister of Education of Ontario (1907), A. C. 69.

Province of Ontario may declare members of appellants' community, who became such after the enactment of B. N. A. Act, 1867, ineligible as teachers in Roman Catholic schools in Ontario unless holders of certificates of qualification to teach in "public schools."

1907 Richelieu and Ontario Nav. Co. v. The "Cape Breton" (1907), A. C. 112.

The provisions of finality as to judgments of Supreme Court of Canada do not take away right of appeal allowed by "Colonial Courts of Admiralty Act, 1890."

1907 McGregor v. Esquimalt and Nanaimo Rway. Co. (1907), A. C. 462.

The British Columbia "Vancouver Island Settlers' Rights Act, 1904," is *intra vires* of provincial legislature; it validated grants in fee without reservation of mines and minerals notwithstanding former Acts which vested the same lands in Dominion in aid of construction of the railway and granted to the railway company, superseding the company's title.

1908 City of Toronto v. Canadian Pacific Rway. Co. (1908), A. C. 54.

Dominion may authorise an order directing measures to be taken by a federal railway for safeguarding the railway, the protection of the public and imposing the expense on the railway company and municipality interested.

1908 Crown Grain Co. v. Day (1908), A. C. 504.

Province cannot circumscribe the appellate jurisdiction of the Supreme Court of Canada. If powers of legislatures overlap, Dominion enactment must prevail (p. 507).

1908 Woodruff v. Attorney-General of Ontario (1908), A. C. 508.

Province cannot impose succession duty on movable property situate outside the province.

1908 Watts v. Watts (1908), A. C. 573.

Supreme Court of British Columbia has jurisdiction in respect to divorce between persons domiciled in the province and in respect of matrimonial offences alleged to have been committed therein.

1909 Compagnie Hydraulique de St. François v. Continental Heat and Light Co. et al. (1909), A. C. 194.

Dominion legislation must prevail in a given field which is within the competence both of Dominion and provincial legislatures.

1910 Dominion of Canada v. Province of Ontario (1910), A. C. 637.

In making the "Indian Treaty, 1873," Dominion did not act as agent or trustee for province, nor with its consent, nor for the benefit of the lands surrendered, but with a view to national interests of its own, in virtue of B. N. A. Act, 1867.

1910 Burrard Power Co. and Attorney-General of British Columbia v. The King, [1911] A. C. 87.

Province of British Columbia cannot authorise grants of water-records interfering with proprietary rights of Dominion in lands within "Railway Belt."

Ottawa. L. W. COUTLEE.

THE PRACTICE OF LAW IN QUEBEC.

There are not more than one hundred and forty practising English lawyers in the whole province but they practically all read French and the greater number speak French sufficiently well to conduct business or examine a witness in Court. Lawyers from the other provinces seldom seek admission to the Quebec Bar unless they are prepared to specialize in some branch of law in which they have gained a national reputation, or enter some established firm. Lawyers of other provinces seeking to become members of the Quebec Bar are asked to pass an oral examination on the Statute Law of the province of Quebec.

Practically all the French-Canadian advocates speak and read English, and many of them are forceful and fluent speakers in English and very effective with Judges and juries. Thinking and speaking in both languages seems to have sharpened their wits. The same can be said of English lawyers who speak French, as some of the ablest lawyers in Canada are found among the English-speaking French and French-speaking English lawyers in the province of Quebec.

The Judges are mainly French-Canadians but with a fair number of English, Scotch and Irish, all of course speaking French fluently.

In the city of Montreal, under the supervision of a committee of the Montreal Bar Council, is the Advocates' Law Library which is recognized as a very useful, well supplied and well conducted library.

In addition to the General Bar Council, which is an incorporated body, there are seven District Bar Councils, also incorporated. The head of the General Council and of the District Councils is called the "Batonnier," and in the Montreal section English and French leaders of the Bar are elected Batonnier alternately. On the walls of some of the larger rooms in the Montreal Court House hang portraits done in oils of past Batonniers.

The General Bar Council makes rules for the discipline of the Bar and is very strict and prompt in seeing that the rules are obeyed. Recently an advocate kept an amount he had collected for a client and gave the client credit on ac-

count of a bill of costs (about which there had been a dispute) in another matter. The advocate was suspended although dishonesty was not charged or suggested.

An advocate cannot "carry" on any handicraft, industry, trade or commerce; discharge the duties of a bailiff or constable; fill the position of a cashier, manager, clerk or book-keeper to an industrial establishment, a commercial firm, a railway or steamship company, or any similar concern; engage in insurance or real estate business; act as a collector, money-lender or agent of money-lender on notes or pledges; be a musician, surveyor, architect or civil engineer."

An advocate cannot be a notary. A notary cannot be an advocate. If, as is occasionally the case, both examinations are passed there must be an election of the profession to be practised. A notary of this province is considered a professional man, and has a very different standing compared with a notary public in the United States or in the English provinces, getting his rights and privileges, which are many, under an act under the title "The Liberal Professions." While the Old French Notarial System is largely followed it can hardly be said of the notaries of the principal centres as was said of the notaries of the large centres of France, "that they are the elite of the two professions." "Notaries are public officers, whose chief duty is to draw up and execute deeds and contracts, to which the parties are bound or desire to give the character of authenticity attached to acts entered into under public authority, to assure the date thereof, to have and preserve the same in safe keeping, and to deliver copies or extracts therefrom." As much value is accorded in evidence to documents certified by a notary as to copies of Court proceedings or a copy of a Court judgment certified by a Judge or the clerk of the Court under seal "British subjects only, of the male sex, are admitted to study the notarial profession," and every notary before commencing to practise must take the oath of office and allegiance before a Judge of the Superior Court. He is appointed for life, and his records, safes, and lawbooks are not liable to seizure. Fees are prescribed for searches and certified copies of a notary's records, and a notary may transfer his records to another notary who is then entitled to such fees. Only a practising notary can sue for any fee for drawing up and preparing writings

affecting real property and requiring to be registered, and passed in a municipality wherein there is a practising notary resident during the preceding six months. On the death of a notary his records are transferred to the office of the Prothonotary of the Superior Court of his district, and his widow or heirs receive one-half of the fees for a period of ten years.

Students become articled and pass a prescribed examination before being admitted as notaries.

Notaries may prepare petitions and submit them to the Judge or prothonotary in certain non-contentious proceedings.

In Quebec Province notaries do not consider a notary public of any of the other provinces or of one of the States as being more than a certifying officer.

Notaries must enter consecutively the dates, number and nature of all deeds passed by them, and the names of the parties, which record is called their "repertories."

Notaries cannot also be physicians or land-surveyors, and if they become priests or ministers they cease to be notaries.

There is some slight similarity in the relation between advocates and notaries, to the English system of barristers and solicitors. Notaries, however, do not appear in even the inferior courts and only have the right to prepare and present petitions in Chambers in a very few non-contentious matters.

In the English provinces, many even of the largest law firms have a department to handle the loaning of money on real estate mortgages. In Quebec most notaries advertise money to loan. As already noticed, by the rules of the Bar Council, advocates cannot hold themselves out as money-lenders, so that this sometimes very lucrative business is controlled by notaries. Notaries probably draft most of the wills (although most of the important wills are drafted under the advice of an advocate) and this results in the notary being frequently appointed a trustee or executor. So it will be seen that the notaries practically control what is sometimes called 'Estate Business."

It may not be out of place just here to say that among other forms, wills may be made "in the form derived from the laws of England," the formalities being set out in the Code. A will signed before a notary does not have to be

probated as it is already "authentic." It is also claimed there is small chance of a will kept in the office of a notary being mislaid.

While this is interesting, the outside lawyer who considers practising under Quebec Law is anxious to know how much opportunity he will have to work under laws with which he is familiar. He will be glad to find such a large number of familiar subjects as the following:

The Public Law.

The Criminal Law.

The Law of Merchant Shipping and Navigation.

The Law of Bills, Notes and Cheques.

The Law of Banks and Banking.

The Law for the Regulation of Trade and Commerce.

The Law of Patents and Copyrights.

The Law of Bankruptcy.

The Law of National Defence, of the Postal Service and of the Census.

The Law of Customs, Excise and Indirect Taxes.

The Law of Currency, Interest, Legal Tender and Weights and Measures.

The Law of Fisheries, Quarantine, Ferries not entirely within the Province, Lighthouses and Beacons.

The Law of Indians and Indian Reserves.

The Law of Naturalization.

The Law of Marriage and Divorce, but not the Solemnization of Marriage.

The Law of Insurance.

The Law of Railways.

The Law of Companies.

The conquest of Canada in 1763 had the effect of substituting the public law of England for that of France, but private law remained the same in accordance with the well known policy of England. As is well known, even within the British Isles there are a number of systems of Private Law, and in the United States there has been Louisiana and more recently Porto Rico, Cuba and the Philippines.

There has been much discussion as to whether the French Public Law was abrogated after the Cession, but it has never been questioned that the English Criminal Law at once came in force. However, The Quebec Act, Aug. 1st, 1866, provided "that in all matters of controversy relative to

property and civil rights, resort shall be had to the laws of Canada as the rule for the decision of the same."

The "Civil Code" and the "Code of Civil Procedure" contain the law as to "property and civil rights" and codify the old French Law of Quebec as modified by statutes, and also codify,—but only as to its broad principles,—the Commercial Law of the Province, which is derived from English as well as from French sources. The Code Napoleon was taken as a model in arrangement and language.

Judge Howe of New Orleans, in his "Studies in the Civil Law" refers[1] to the Quebec Civil Code as "an excellent specimen of juristic work" and in discussing the Roman and Civil law in America gives considerable space to the Quebec Civil Code. He also gives an interesting account of the establishing by France of that other great colony to which La Salle gave the name of Louisiana, and points out the similarity of its legal history to that of Quebec. He also reminds us that the Louisiana of La Salle was not bounded by the limits of the State which now bears that name, but that it extended, in theory at least, "from the Gulf of Mexico to the dim regions which now constitute British America, and westwardly to the Rocky Mountains, and possibly to the Pacific." He also refers[2] to the curious fact that the Custom of Paris was in force in theory in Michigan and in Wisconsin down to the year 1810, when the legislature of Michigan declared that it did not know what the Custom of Paris was and that there was no easy means of finding out, and enacted a statute[3] abolishing the Civil law and "adopting the principles of law which prevailed in the other States of our country so far as applicable to the situation."[4]

French and English authorities are referred to, depending on the source of the law under discussion, and American cases and writers are often mentioned.

In the proof of commercial matters (by statute) the rules of the Law of England are to be resorted to when no provision is found in the Code. It is stated to be the tendency of the Quebec Courts in commercial cases to follow the

[1] (Ed. 2), p. 135.
[2] Ibid, p. 134.
[3] I Mich. Terr. Laws, 210.
[4] The author refers in this connection to *Lorman* v. *Benson*, 8 Mich. 18, 25; and *Coburn* v. *Harvey*, 18 Wis. 156, 158.

opinion of the House of Lords in *Dorey* v. *Cory*[5] which was as follows: "Their Lordships thought "that, in the absence of any legislation in force in Quebec inconsistent with the law as acted upon in England, and in the absence of any evidence of custom and of course of business to the contrary, the Court of King's Bench was right in accepting the English rulings, because they were based, not upon any special rule of English law, not upon any circumstances of a local character, but upon the broadest considerations of the nature of the position and exigencies of business."

But, notwithstanding decisions holding that the source of Quebec Commercial Law is English, learned authorities say that the Quebec system of Commercial Law is neither French nor English, but that the Courts have considered authorities from all commercial countries and adopted the rules which appeared to be best suited to the conducting of mercantile business in Quebec.

In passing, it may be mentioned that, as in France, the notes of commentators are called "the doctrine," and the decisions of Courts "the jurisprudence."

In interpreting the Code when the source of the law is French the French system is followed and the opinions of recognized commentators are preferred unless the jurisprudence is settled. There is a large amount of jurisprudence settling the law in Quebec and as to which nothing definite is found in the Code, as for instance, the Law of Libel, which differs from both the English and the French Law.

Practice in the Courts is regulated by the Code of Civil Procedure which, authorities state, does not resemble the French Code of Civil Procedure in anything like the same degree which the Quebec Civil Code resembles the Code Napoleon. The Code of Procedure is said to have borrowed largely (as was the case in preparing the Code of Procedure of New York State) from the Code of Civil Procedure of Louisiana, and in addition includes such remedies as writs of injunction, mandamus and prohibition, all of English origin. There are a number of annotations of the Code of Civil Procedure, some in French, some in English and others in both French and English. The tendency in connection with practice I understand to be to cite English cases, and most law offices contain the latest English books on practice.

[5] [1901] A. C. 477.

Here you may have the novel experience of issuing a writ and claim using English and receiving a defence in the same action in French.

The Municipal Law which came into force in 1871 and the Law of Civil Procedure are under the Legislative authority of the province, but are not included in the Civil Code.

It may be mentioned here that the reports of cases are sometimes in French and sometimes in English, if English persons are the litigants usually the case is reported in English.

In the trial of commercial actions the jury is made up of merchants or traders only, unless one of the litigants exercises his right to have one-half only of the jury merchants or traders. If the parties are of different origin either of them may demand a jury of equal numbers of persons speaking the French language and of persons speaking the English language, and each advocate is allowed to address the jury in each language.

Private International Law is treated in very brief outline in the Civil Code and there has been a tendency to include it as of the Public Law, but learned writers are strongly opposed to this view. (See "The Conflict of Laws" by E. Lafleur, K.C., Professor of International Law, McGill University).

It would be very discouraging to a common law lawyer if on the intricate subject of Private International Law he had to refer very often to French law (not modern French law, but the law before 1763), and it is comforting to find it stated by the recognized authorities that there is now for the Quebec Courts a considerable body of settled jurisprudence in this branch of the law.

There is no Divorce Court in the province, but there is provision in the Civil Code for a judicial "separation from bed and board."

When one has a fair knowledge of the leading principles of Roman Law and understands the meaning of its technical terms, which at first appear alien and mystical, he may read the Quebec Codes with interest and he will find that, after all, there is not so great a difference between the Civil law and the Common law, however much there may be variation in forms of procedure and variety of expression in

the opinion of judges. In the elementary principles essential to the administration of justice between man and man the leading doctrines are found to be much the same as the Common law.

In my recent reading, I found "The Scope and Interpretation of the Civil Code of Lower Canada," published in 1907 by Dean Walton of the Faculty of Law, McGill University, particularly interesting and instructive.

MONTREAL. HOWARD S. ROSS.

EXAMINATION-IN-CHIEF OF WITNESSES.

There is perhaps no part of the advocate's duty the importance of which is so great as the task of presenting to the Court in an attractive guise the evidence which supports his client's case. Yet no one but the skilled and experienced advocate ever quite appreciates the difficulty of that task. To the layman and the novice examination-in-chief seems a simple, easy matter—nay, more, a dull affair, since it has in it none of that element of the combat and the chase which the spectator at once discerns in the contest of wits between counsel and witness which takes place in cross-examination. Yet it is strictly true that always to the plaintiff, and nearly always to a defendant who has to call witnesses of his own, examination-in-chief is a much more decisive factor in winning a favourable verdict than is cross-examination. A story has to be told. It must be told by witnesses in answer to questions put by counsel. Those questions must follow the accepted rules of evidence, or they will be rejected. And the story told in this necessarily disconnected way has to be told very slowly, so that the Judge may get it on his notes. All this is apt to distract the attention and weary the patience of a jury, so that the most essential features of the case may fall on unheeding ears and unreceptive minds. To overcome the difficulties incidental to this technical mode of adducing testimony, and to counteract the tendency towards helpless confusion of mind, which it is apt to produce in the jury, is one of the most

necessary arts at the advocate's command, and one with which only natural genius or long experience can endow him.

In this art, however, as in all others, it is possible to ascertain by analysis the causes which produce excellence. It is possible to devise rules which will guide the novice in the attainment of the desired result. These rules, when ascertained, are indeed but obvious common sense; yet, like all rules derived from common sense, they are nearly always neglected by the most sensible people until pointed out to them either by some mentor, or else by that greatest of teachers, painful experience. They may be summarized in what we will venture to call the five maxims of examination-in-chief, namely:—

(1) Unless there is some reason to the contrary, always call your witnesses in the order of their importance to the story.

(2) Elicit facts from each witness in their logical order, which is usually their chronological order as well.

(3) Never put questions which violate the rules of evidence.

(4) Adapt your questions and manner to the character and intelligence of the witness.

(5) Avoid the faults of a monotonous or an undignified style.

These maxims seem very simple, but to apply them in practice involves an attentive study of each as well as many attempts and failures before proficiency is reached. For the advocate has to think on his feet, and apply at once the rules he carries in his head. Unlike the writer of an article or the draftsman of a conveyance, he cannot sit down and correct in detail the errors of his rough draft. A mistake once made is irrevocable without confusion and shame. We will endeavour to assist the novice by presenting in a little more detail the principle which lies behind each of our five maxims.

First, the advocate has a number of witnesses, and he is going to call them—so far as practicable—in their order of importance. Now, a young advocate and many an old one—is apt to assume that this means the order in which the proof of each follows each other in his instructions. Indeed we recollect an eminent King's Counsel whose mode of calling witnesses was simplicity itself. The reader will

remember that in a High Court case, when two counsel are engaged, it is usual for the leader to examine the first, third and other odd number of witnesses, while the junior takes the second and other even numbers. Now the K.C. to whom we refer used to arrange his witnesses so that all the important ones were odd numbers, and all the unimportant or formal witnesses were even numbers. This plan may have its merits in some cases, but it hardly furnishes us with a logical rule. The true plan to adopt is this. In each case there is usually some one witness who can speak to practically the whole case, whereas the others are only called to prove particular items of fact which are necessary links in the chain. For example, in a running down case, the plaintiff has usually been present at all material times and can tell the whole story in a connected form. Such a witness should go first, unless there is some strong reason for adopting a different plan. A consecutive narrative secures the attention of the jury, and has a logical sequence about it which helps to gain credence for it. Socrates held that "truth" was only another name for a perfectly clear idea. Whatever may be the philosophical value of this proposition, it is certainly true in practice that a clear story clearly told, in an order which impresses itself with clarity on the memory of the auditor is often accepted for the truth. If, on the other hand, you call a series of witnesses, the first of whom came on the spot after the accident happened, the second of whom saw your opponent's car but not yours, the third of whom observed that you were on the right side of the road, while the fourth merely saw the accident and nothing more, the jury will have got into endless confusion of mind and have ceased to credit your opening speech at all long before that fourth witness is reached. The wise plan, then, is this: Call first any witness who can give evidence as to every part of your case. Call next your witness whose evidence is second best in the same respect of completeness, and so on. When you have witnesses to mere fragmentary parts of the case, call them in the chronological order of the facts they are to prove. Of course this is a rule of perfection, and in practice it is often necessary to depart from it. But such departures should be rare, and should never be indulged in out of mere caprice.

Our second maxim relates to the examination of each witness. Here the same principle applies; get out a clear

consecutive story. Therefore put your questions in their proper sequence. Nothing is so seldom done. Generally advocates put their questions in the order that they appear in the proofs of the witness—which now very often represents the office boy's notion of artistic narrative. Now, the wise thing to do is to compare your proof with the pleading, if it is a High Court action, and to put a number, 1, 2, 3, &c., against each question in the proof to denote that it belongs to the corresponding paragraph in the pleading. Then take your questions in the same order as the pleading, for that is presumably in its proper logical order. If the action is in the County Court or police court, where there are no written statements of claim and defence, then make out a rough pleading of your own, properly numbered in paragraphs, and telling the story in a chronological order. For instance, in a simple collision case you will have the following parts of the case: The position of parties prior to the collision; the negligent conduct which led to it; the actual collision itself and its details; the injury done; the damages consequent thereon, and any subsequent admissions or conduct of the plaintiff or defendant which affect the case. Take each witness through the case in that order, and get out of him what he knows of each. If he has to prove a document or produce an exhibit, let it be done in its proper place in this casual sequence. If he has to repeat an admissible conversation, fix that link too in its place in the chain.

Limits of space compel us to deal more briefly with our third, fourth and fifth maxims. With respect to the third, it is necessary that an advocate should thoroughly appreciate the rules of evidence and be able to conform to them in practice. He should have by heart, thoroughly understood, the rules as to admissible forms of hearsay evidence, admissible statements, the relevancy of expert opinion, conduct and character. He should understand the various modes of proving documents, and the cases in which secondary evidence may be given. He should never be caught napping with unstamped agreements. If he breaks these rules of evidence, he gets into conflict with his opponent, gets snubbed by the Judge, and offends the jury by being the cause of a wrangle which is annoying and discomforting to everybody. Again, of course, it is absolutely essential that an advocate should try to understand his

witnesses and deal with each after his kind. A nervous witness must be encouraged with kindly smiles and soft tones—not told in an angry, impatient voice to "speak up, please!" A rhetorical witness, who is colouring and exaggerating your case with imaginary details which will be turned into hay by your opponent when he comes to cross-examine him must be repressed and forced to keep to bare details. Impudent or flippant witnesses must be taught manners, or they will damn your case with the jury. Lastly, the advocate must try to be attractive. He must modulate his voice and avoid a languid, prosy, dead-alive style which sends half the jury into yawning fits. He must win their respect by the avoidance of undignified manners and gestures.

PROPERTY IN THE TITLE OF A BOOK OR NEWSPAPER.

It is sometimes said that there can be no copyright in the title of a book or newspaper. This statement, however, is too wide. There appears to be no actual decision to the effect that there can be no copyright in the title of a book, because the question has not arisen for decision. There are *dicta* to the effect that this kind of copyright can, and that it cannot, exist. There is an authoritative decision as to the title of a newspaper, and the Court of Appeal has held that there can be no copyright in such a title. In one case (*Dicks* v. *Yates,* 18 Ch. D., at p. 90) Sir George Jessel said: "There seems to be a certain amount of confusion in the minds of some counsel, and perhaps of some Judges, between copyright and trade-mark. The things are totally distinct." So far, in fact, rights of property in the titles both of books and newspapers have been treated as in the nature of trade-mark and not copyright property. Three cases will illustrate this, and at the same time also shew the limits of the proposition that copyright cannot exist in a title.

The first of these cases is *Weldon* v. *Dicks* (10 Ch. D. 247), decided by Malins, V.-C. The plaintiff and the defendant were rival publishers, and the dispute related to the title of a serial story called "Trial and Triumph." The

plaintiff was held entitled to an injunction against the defendant's publication, on the ground that the plaintiff had the copyright and had suffered damages by the defendant's use of the title. Malins, V.-C., expressed a strong opinion to the effect that a man might have copyright in a title: "The title of the book is part of the book . . . and is as much the subject of copyright as the book itself." Reference was made to Thackeray's Vanity Fair, and the Vice-Chancellor said: "A person buying the cheap edition would expect to get Thackeray's work, and what a fraud it would be if he had got some spurious thing not worth reading." In *Dicks* v. *Yates* (18 Ch. D., at p. 91), Lush, L.J., made some observations on the part of the judgment of Malins, V.-C., bearing out Sir George Jessel's general remark already quoted. Lush, L.J., said: "That was an allegation of a common law fraud, and although the learned Vice-Chancellor did not explicitly put his judgment on that allegation, I cannot help thinking that it influenced his mind from beginning to end, and that he did not distinguish between a violation of a common law right and an infringement of copyright."

The dispute in *Dicks* v. *Yates* (*supra*), the second of the three cases referred to, related to the right to use as the title of a tale the words "Splendid Misery." Some observations have already been quoted from the judgments delivered in the Court of Appeal. Sir George Jessel expressly said: "Now I could not say that there could not be copyright in a title, as, for instance, in a whole page of title or something of that kind requiring invention. However, it is not necessary to decide that." Lush, L.J., again, said: "Nor is the question before us whether copyright can exist in the title of a work. The sole question before us is whether there can be copyright in the two words which the defendant has taken—namely, the words 'Splendid Misery,'—which have been used by the plaintiff as the title of his tale." These words, it was held, were a mere "phrase which had long been in public use," and the plaintiff was held to have no ground for an injunction. The Court of Appeal, it will be noticed, while disapproving of *Weldon* v. *Dicks* so far as that case was decided on the ground that copyright may exist in a title, did not in this case decide that such copyright may not exist.

The last of the three cases to be noticed is *Licensed Victuallers' Newspaper Co.* v. *Bingham* (38 Ch. D., 139). This was the decision of the Court of Appeal as to copyright in the title of a newspaper already referred to. The plaintiffs had published, and registered at Stationer's Hall, the first number of a newspaper entitled The Licensed Victualler's Mirror, and shortly afterwards the defendant published another paper under the same title. It was held that the plaintiffs were not entitled to prevent the publication of the defendant's paper. Cotton, L.J., puts the matter thus: "The cases where such injunctions have been granted depend on this—that the plaintiffs have obtained by user such a title to the name that another person can be restrained from using it, because by using it he would be passing off his paper as the paper of the plaintiffs." Lindley, L. J., said: "The plaintiffs must make out an exclusive right to the name. How have they acquired it? The Copyright Acts do not help them, for *Weldon* v. *Dicks* is on this point overruled by *Dicks* v. *Yates*. They must then fall back on the old principles, and establish their right by a user which has given them a reputation." Bowen, L.J., also thought there could be no copyright in the title of a newspaper.

In view of pending copyright legislation, some further observations of Lindley, L.J., are worth quoting: "It seems to me to be a flaw in the Copyright or Trade-Marks Act that they do not enable a person to acquire an exclusive right to the name of a newspaper, though commercially it may be of great value."

This question is of some immediate interest in view of a recent decision with respect to the right of the proprietors of the recently issued *Evening Times* to use that title. In *George Outram & Co.* v. *London Evening Newspaper Co.*, the plaintiffs (proprietors of an *Evening Times* published and circulating in Glasgow) claimed an injunction to restrain defendants (proprietors of the new *London Evening Times*) from publishing and selling their paper under its present name. Warrington, J., dismissed the action with costs and said "that for the plaintiff to succeed they must shew that the conduct of the defendants was such as to lead to the injury of the plaintiffs." The one paper being a Glasgow, and the other a London paper, no injury was likely to be done to the plaintiffs.

IN THE PRIVY COUNCIL.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, (LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW, LORD MERSEY, AND LORD ROBSON.)

[FEBRUARY 3RD, 1911.

(1) THE MINISTER OF PUBLIC WORKS OF THE PROVINCE OF ALBERTA v. THE CANADIAN PACIFIC RAILWAY COMPANY.

(2) THE KING v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Canada—Land Taxation—Exemption until lands "sold"—Exemption for 20 years after "grant from Crown."

Certain lands granted to a railway company were exempted from taxation "until they are either sold or occupied," for 20 years "after the grant thereof from the Crown."

Held (1, that the word "sold" involved a complete sale; and (2), that the proper meaning of the expression "grant from the Crown," was a conveyance by letters patent under the Great Seal, and, therefore, that in the case of lands not sold or occupied the period of exemption from taxation ran from the date of the letters patent conveying the lands to the railway company.

These were appeals from judgments of the Supreme Court of Alberta of January 21, 1910.

Mr. Danckwerts, K.C., *Mr. Woods,* K.C. (of the Canadian Bar), *Mr. Hamar Greenwood,* and *Mr. Horace Douglas* appeared for the appellants.

Sir Robert Finlay, K.C., *Mr. Ewart,* K.C. (of the Canadian Bar), *Mr. Creelman,* K.C. (of the Canadian Bar), *Mr. J. Stewart Tupper,* K.C. (of the Canadian Bar), and *Mr. Geoffrey Lawrence,* for the respondent company.

The arguments were heard in November before a board composed of Lord Macnaghten, Lord Atkinson, Lord Shaw,

Lord Mersey, and Lord Robson, when judgment was deferred.

Lord Macnaghten, in delivering their Lordships' judgment, said: The two actions which have given rise to these appeals were brought to enforce two separate claims by or on behalf of the province of Alberta to tax certain lands belonging to the Canadian Pacific Railway Company.

The lands in question formed part of the land subsidy earned by the railway company in the construction of their railway. In 1881, when the construction contract was approved and ratified by an Act of the Dominion Parliament (44 Vic., c. 1), the district in which the lands are situated was part of the region known as "the North-West Territories." The Province of Alberta, which was carved out of the North-West Territories, was not established until 1905.

Though the questions involved in the two actions are quite distinct, they both turn on the wording of clause 16 of the Construction Contract. That clause is in the following terms:—"16. The Canadian Pacific Railway and all stations and station grounds, workshops, buildings, yards, and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the company, shall be for ever free from taxation by the Dominion or by any province hereafter to be established or by any municipal corporation therein; and the lands of the company in the North-West Territories until they are either sold or occupied shall also be free from such taxation for 20 years after the grant thereof from the Crown."

In the appeal which is brought in the name of His Majesty the King in the right of the province of Alberta the question turns upon the meaning of the word "sold" as used in that clause. It seems that in September, 1902, the railway company agreed to sell to one Schaetzel three sections of land which had been conveyed to the company by letters patent from the Crown, dated July 20, 1901. There were three agreements. The price of one of the sections was $1,644, the price of each of the others was $1,920. On signing the agreements a payment of $320 was made by the purchaser in respect of each section. The remainder of the purchase money was to be paid in five equal annual instalments at fixed dates specified in the agreements.

In each case time was made of the essence of the contract, and each agreement contained a provision that if the purchaser should fail to make the stipulated payments, or any of them, within the times limited for payment, the company should have the right to declare the contract null and void by notice in writing to that effect personally served on the purchaser, or mailed in a registered letter addressed to him at a post-office named in the agreement. Besides the three sums of $320 paid on the execution of the three agreements nothing was ever paid by the purchaser towards the purchase money, and on November 1, 1905, the company duly declared the three agreements null and void.

It is admitted that the lands have never been occupied within the meaning of clause 16. The contention on the part of the appellant is that although there was no sale in fact, and although each of the three agreements for sale was duly avoided and annulled in pursuance of authority contained in the agreement itself, yet the lands have been sold within the meaning of that expression in the construction contract. So strange a contention does not seem to require a serious answer. But an answer may be given in the language of Chief Justice Ritchie, who disposed of the point when it was raised in 1891 before the Supreme Court. "There must have been," said that learned Judge, "a completed sale, and the property must have passed out of the Canadian Pacific Railway Company and vested in the purchaser before it could become liable to taxation." (*Rural Municipality of Cornwallis* v. *The Canadian Pacific Railway Company,* 19 S. C. R. 702.)

The action which gave rise to the other appeal was brought by the Minister of Public Works of the Province of Alberta for the purpose of determining the date from which the period of exemption mentioned in the latter part of clause 16 is to be reckoned. In the case of the "lands of the company in the North-West Territories," which have not been sold or occupied, the period of exemption is defined as a period of "20 years after the grant thereof from the Crown." The proper meaning of the expression "grant from the Crown" in the case of a land grant is a conveyance by letters patent under the great seal, and although, of course, Crown lands may be transferred to a subject by Act of Parliament, such a transfer would not ordinarily or properly be described as a "grant from the Crown."

The contention on the part of the respondent is that in the case of lands proposed to be taxed the period of exemption must be reckoned from the date of the letters patent conveying those lands to the company. The earliest patent in the present case is dated April 6, 1903.

The contention on the part of the appellant is that the period of exemption runs not from the date of the conveyance of the lands now proposed to be taxed, but from June 18, 1884, the date on which the survey of these lands was approved by the Surveyor-General of Canada, and the lands were thus identified as part of the subsidy in land to which the company was entitled.

It was one of the conditions of the construction contract that grants in respect of the land subsidy should be made in alternate sections of 640 acres extending back 24 miles on each side of the railway—the company receiving the sections bearing uneven numbers. It was, however, provided that if any of such sections "consisted in a material degree of land not fairly fit for settlement" the company should not be bound to receive them as part of such grant. This provision led to prolonged discussion and negotiation between the company and the Government. Some lands which the company at first rejected were afterwards accepted, and some that were at first occupied were rejected afterwards. The result was that in a considerable number of cases the destination of lands appropriated to the land subsidy was not definitely fixed until long after the date when the survey was approved in the Surveyor-General's office. As the learned counsel for the respondent pointed out, there would have been much complication and confusion if the construction contended for by the appellant had been adopted.

In point of fact, however, whenever the question has been argued in the Canadian Courts the ordinary and proper signification of the expression "grant from the Crown" has been adopted. The leading case is the case of *North Cypress* v. *Canadian Pacific Railway,* (38 S. C. R. 550). In deference to the decision of the Supreme Court of Canada in that case, formal judgments were only delivered by the trial Judge, and by the learned Judges in the Supreme Court of Alberta, from which the second appeal is brought. It was argued that if the expression "grant from the Crown" was to lose its power and ordinary signification

it would be in the power of the railway company, by delaying to accept Crown grants or even by simply abstaining from pressing for such grants, to defer their liability to taxation for an indefinite period.

It must, however, be remembered that at the time when the construction contract was made lands in the North-West Territories were the property of the Dominion, and that any delay in perfecting Crown grants would be the fault of Dominion officers. The circumstance that but for the contract the lands would now be liable to taxation for provincial purposes cannot alter the rights of the railway company, nor does that fact of itself necessarily lead to delay in perfecting the grants. The whole contract was subjected to a very close and critical examination, but their Lordships are satisfied that there is no reason for departing from the ordinary and proper signification of the expression "grant from the Crown."

Their Lordships are therefore of opinion that in the case of lands not sold or occupied the period of exemption from taxation mentioned in clause 16 of the construction contract runs in each case from the date of the letters patent conveying the lands to the railway company. Their Lordships will therefore humbly advise His Majesty that both appeals should be dismissed. In accordance with an agreement between the parties there will be no order as to the costs of the appeal.

Solicitors: *George Hamilton* and *Blake & Redden.*

STATEMENT MADE IN PRESENCE OF PRISONERS.

Two recent decisions of the Court of Criminal Appeals appear somewhat difficult to reconcile. In the first, *The King* v. *Thompson,* 1910, 1 K. B. 640, the appellant and one Archer had been arrested on a charge of burglary, for which they were indicted at the Derbyshire Quarter Sessions. Archer pleaded guilty and the appellant not guilty. After the arrest Archer made and signed a voluntary statement, not in the appellant's presence, to a police officer. When afterwards charged at the police station, Archer replied, "I have made my statement and signed it. The appellant said, "I know nothing about it." The statement was then read over to the two prisoners. The statement began by saying that "when Dick" (the appellant) "came from Dartmoor he called at Archer's house," and it went on to implicate both in the burglary. As soon as the statement was read over the appellant said, "It is a pack of lies. I don't know the man at all." Archer then said, "you know it is the truth. Why don't you own up like a man?"

This statement was objected to by counsel for the appellant as not being admissible against him, as he had denied the truth of the whole of it. The chairman admitted it, and it was read to the jury, the chairman at the same time telling them that they must not accept anything that was stated in it as true. Archer was afterwards called as a witness for the prosecution and his was the principal evidence against the appellant. The chairman in summing up after directing the jury that it was necessary before they could act on the evidence of an accomplice that his evidence should be corroborated, said with reference to Archer's statement: "When Thompson was taken into custody the statement was read over to him. I would not ask you to place too much reliance upon that statement for this reason, that when the statement was read Thompson immediately said it was a pack of lies. I do not think you can accurately draw from that any inference as to the truth of the statement contained in that disclosed to Thompson. He denied the whole matter, and it rests there." The appellant was found guilty and sentenced to seven years' penal servitude.

The Court (Lord Alverstone, C.J., Ridley and Darling, JJ.) dismissed the appeal. They held that the statement of Archer, which was read over in the presence of the appellant, was properly admissible in evidence against him, though the weight which should be attached to it was entirely a matter for the jury to determine upon a proper direction after hearing all the evidence; and the most that could be said was that the statement was given in evidence at an earlier stage of the trial than it might have been if the case had been conducted differently. The Court declined to follow the ruling of Hawkins, J., in *R.* v. *Smith*, 18 Cox C. C. 470, that such a statement was not admissible unless in whole or in part admitted by the appellant to be true, holding that a decision to that effect would in strictness exclude the case of a prisoner remaining silent and giving no indication whether he admitted or denied the truth of any part of the statement.

In the second case, *The King* v. *Norton*, 1910, 2 K. B. 496, the prisoner had been convicted at the Leeds Assizes on a charge of carnally knowing. He appealed against the conviction on the ground that the Commissioner had misdirected the jury as to the effect of statements made in his presence by the girl, who was not called as a witness, charging him with having committed the offence. Counsel for the Crown admitted that there had been a misdirection, but relied on the provision in the Criminal Appeal Act 1907, that where in the circumstances there had been no substantial miscarriage of justice the appeal should be dismissed. The statements were to the effect that the girl had accused the prisoner of the offence and he had denied it. Objection was taken to the Commissioner's direction on the ground that he had directed the jury to take into consideration the girl's statement as evidence of the facts contained in it, and to consider whether looking at all the circumstances they accepted it or the prisoner's denial; whereas they should have been directed that the statements were not evidence of the facts stated, and that as the prisoner had denied them they should be disregarded.

The judgment of the Court (Lord Alverstone, C.J., Pickford and Lord Coleridge, JJ.), allowing the appeal, was delivered by Pickford, J. After reviewing the facts, the learned Judge proceeded to state the grounds generally of the admissibility of such statements in evidence. The gen-

eral rule was that statements as to the facts of a case under investigation were not evidence unless made by witnesses in the ordinary way; but to that rule there were exceptions. One was that statements made in the presence of a prisoner upon an occasion on which he might reasonably be expected to make some observation, explanation or denial were admissible under certain circumstances. "We think it is not strictly accurate," he proceeded, "and may be misleading, to say that they are admissible in evidence against the prisoner, as such an expression may seem to imply that they are evidence of the facts stated in them; they are admissible only as introductory to, or explanatory of, the answer given to them by the person in whose presence they are made. Such answer may, of course, be given either in words or conduct, *e.g.*, by remaining silent on an occasion which demanded an answer. If the answer given amount to an admission of the statements or some part of them, they or that part become relevant as shewing what facts are admitted; if the answer be not such an admission the statements are irrelevant to the matter under consideration, and should be disregarded." Pickford, J., further pointed out that the fact of a statement having been made in the prisoner's presence might be given in evidence, but not the contents, and the question might be asked, what the prisoner said or did on such statement being made. If his answer, given either by words or conduct, were such as to be evidence from which an acknowledgment might be inferred, then the contents of the statement might be given, and the question of admission or not in fact left to the jury; if it were not evidence from which such an acknowledgment might be inferred, then the contents of the statement should be excluded. To allow the contents of such statements to be given before it was ascertained that there was evidence of their being acknowledged to be true must be most prejudicial to the prisoner, as whatever directions were given to the jury, it was almost impossible for them to dismiss such evidence from their minds. It was perhaps too wide to say that in no case could the statements be given in evidence when they were denied by the prisoner, as it was possible that a denial might be given under such circumstances and in such a manner as to constitute evidence from which an acknowledgment might be inferred; but they should be rejected unless there was some evidence of

an acknowledgment of their truth. "Where they are admitted," he continued, "we think the following is a proper direction to be given to the jury: That if they come to the conclusion that the prisoner had acknowledged the truth of the whole or any part of the facts stated, they might take the statement, or so much of it as was acknowledged to be true (but no more), into consideration as evidence in the case generally, not because the statement standing alone afforded any evidence of the matter contained in it, but solely because of the prisoner's acknowledgment of its truth; but unless they found as a fact that there was such an acknowledgment they ought to disregard the statement altogether." As regards the contention that the appeal should be dismissed because no substantial miscarriage of justice had occurred, the Court held before an appeal could be dismissed on that ground, it must be satisfied that the jury would, without the inadmissible evidence—not merely might —have found the prisoner guilty.

The judgment delivered by Pickford, J., contains a very clear and concise summary of the law. In accepting it, it seems impossible to justify the admission of the statement in *R.* v. *Thompson*. There the appellant expressly denied the truth of the whole statement. Its effect on the jury would be obvious. It started with a reference to the prisoner having been at Dartmoor, from which they would at once infer that he had been previously convicted. According to the principles so lucidly defined by Pickford, J., although the fact of the statement in *R.* v. *Thompson* having been made could have been given in evidence, the contents of that statement should certainly never have been submitted to the jury.

BEQUESTS OF ANNUITIES.

A bequest of an annuity may take the form of a direction to buy an annuity of a certain amount, or to lay out a certain sum in purchasing an annuity, or the annuity may be charged on or payable out of the testator's assets. Dealing with the first mentioned method it is probable that many readers are not aware that the bequest of an annuity, coupled with a direction that a sum of money shall be laid out in its purchase amounts to a gift of the capital sum required to purchase the annuity, and either the annuitant or, if he should die before the purchase, his representatives are entitled to have the capital value of the annuity paid to him or them. The reason for the rule is obvious so far as regards the annuitant personally. If the annuity were purchased the annuitant might at once sell it and it would be an idle form to purchase an annuity which the annuitant can sell immediately afterwards. It might be supposed that this rule would be restricted to the annuitant personally, and that, if he died without electing to take the capital sum, his representatives could not so elect. But this is not so, and various cases have established that where moneys are bequeathed to be invested in the purchase of an annuity for the life of a legatee, who dies before it is laid out or even before the fund is available, as during the life of the person after whose death the investment is to be made, yet still it is a vested legacy from the death of the testator, and that the legatee, having survived the testator, or his representatives, may elect either to take the sum or have it laid out in an annuity. The rule was clearly stated by Grant, M.R., in *Palmer* v. *Crawford* (3 Swanst, 483), where £3,000 had been bequeathed in trust to purchase an annuity for the testator's brother. The brother died three years after the testator and before the annuity had been purchased, and it was held that the bequest was in effect the bequest of a legacy of £3,000 which the annuitant's executors were entitled to have paid to them with interest at 4 per cent. from the date of the testator's death.

It is not perhaps quite correct to talk of the annuitant electing whether to take the capital sum or have it laid out in an annuity. The gift of a sum to be laid out in an annuity is *prima facie* the gift of a capital sum, and is pay-

able to the annuitant's representatives should he die before it has been laid out. But the annuitant, if he lives, can elect to have an annuity purchased. The rule is the same whether there is a direction to lay out a specific sum in the purchase of an annuity, or whether an annuity of a specified amount is directed to be purchased. Thus in *Dawson* v. *Hearne* (1 R. & M. 606), a testator directed that within three months after his death, an adequate sum should be applied out of his personal estate in the purchase for his wife of a Government annuity of £250 a year, and the wife was held entitled to the capital value of the annuity. The amount was as certain as though a specific sum to be laid out on the purchase had been mentioned. *Id certum est quod certum reddi potest.*

An attempt was made in *Re Robbins* (1907, 2 Ch. 8), to say that, since in the absence of a contrary direction there is no obligation cast upon executors to purchase an annuity before the expiration of a year from the testator's death, if the annuitant dies within the year the purchase becomes impossible and the bequest fails. In *Dawson* v. *Hearne* the annuity had to be purchased according to the will within three months, and the annuitant survived that period. But this argument, ingenious though it was, failed. Cozens-Hardy, M.R., said that a bequest of a sum to purchase a life annuity is regarded as a legacy of the definite sum which will be satisfied by the purchase of an annuity, and unless and until the purchase is made it is regarded as a legacy of the definite sum vesting in the intended annuitant on the testator's death. It made no difference that the annuity was not to be purchased until some future period if the annuitant survived the testator and died before that period. Further it was decided in the same case that where no time is fixed when the annuity is to commence, it is taken to commence as from the testator's death, and it is as on that date that the sum required to purchase the annuity is to be ascertained. But this last observation must be taken as subject to the decision of *Re Brunning* (1909, 1 Ch. 276), where there was a bequest of an annuity of £200, with a direction to lay out a sum sufficient to purchase such an annuity. The annuitant died six months after the testator but before the annuity had been purchased. The executors had three months after the testator's death paid the annuitant £50, a quarter's instal-

ment. The question then arose whether the sum required to purchase the annuity should be estimated as at the testator's death, or later, and it was held that the annuitant by accepting the quarter's payment had postponed her rights to the end of the quarter, and consequently that the capital value of the annuity was to be estimated at the expiration of three months from the testator's death.

If a testator desires that the annuitant shall not have the value of the annuity he cannot effect this by a mere direction to that effect, for such a direction is repugnant and void. His plan is to provide that if the annuitant attempts to alienate it, the annuity shall go over or shall cease to be payable. In neither of these cases is the annuitant entitled to have the value of the annuity paid him. *Power* v. *Hayne*, 8 Eq. 262, and *Hatton* v. *May*, 3 Ch. D. 148. In the latter case a testator directed his trustees to purchase an annuity for a married woman, to be paid her for her separate use, with restraint on alienation and anticipation, and the proviso that on anticipation it should sink into residue, and that she should not be entitled to receive the value in cash. It was held that she was not entitled to be paid the value, but that the strict terms of the gift must be observed. If, however, the annuity is directed to be purchased in the name of the annuitant, then *Hunt-Foulston* v. *Furber*, 3 Ch. D. 285, is authority for saying that the proviso for cesser on alienation is repugnant, and the annuitant is absolutely entitled to the annuity.

In a case where a testator, instead of directing his trustees to purchase an annuity of a given amount, or lay out a certain sum in purchasing an annuity, charges the annuity on his property, the position is altered and he may impose conditions, and the annuitant is not entitled to demand the value of the annuity. Perhaps the testator will in addition have empowered his trustees to purchase a Government annuity to answer the annuity charged on his assets. This discretionary power creates no enforceable trust, and no vested right in the annuitant to receive the value, unless and until the money has been set aside for the purchase. Thus in *Re Mabbett* (1891, 1 Ch., 707), a testator gave A and B annuities charged on his real estate and empowered his trustees to purchase Government annuities to answer therefor. The trustees, in the exercise of their discretion, sold the real estate, the conditions of sale pro-

viding that the purchase money should be applied in buying Government annuities. A survived the completion of the sale and B did not. It was held that A was entitled to the capital value of his annuity, that is, he was entitled to intercept the money which would have gone to purchase the Government annuity and require it to be paid to him. But as regards B it was held that, not having survived completion, he had no vested right to receive the money, since the trustees might have varied the contract before the completion and B could not have enforced it. Had he been able to do so it would have made all the difference and would have put him in the same position as A.

In connection with an annuity payable out of the testator's assets, it is often a question to decide whether it is charged on *corpus* or income, and in the latter case whether on current income only. The question is important, if the yearly income is not sufficient to pay the annuity, for in such a case the annuitant may ask that the arrears of the annuity be paid out of capital or out of future surplus income. The answer to the question seems to depend on the words used in the will though the cases are rather conflicting. The latest on this subject is *Re Watkin's Settlement,* where the trusts of, in this case, a marriage settlement, provided that a yearly sum should be paid out of the income to the wife for her life, and the trust funds were to be held, after paying the said yearly sum and subject thereto, for the husband. It was held that the annuity was a charge both on *corpus* and future surplus income, and it may, at present at all events, be taken to be settled that where there is an ultimate gift of the trust fund "subject to the annuity" the annuity is charged on the *corpus* and also on future surplus income, since the limitations subsequent to the gift of the annuity are only created subject to the full payment of the preceding gift of the annuity.

The Library

"And what of this new book?"—*Sterne.*

"Men disparage not antiquity who prudently exalt new enquiries."
—*Sir Thomas Browne.*

A Selection of Legal Maxims Classified and Illustrated. By HERBERT BROOM, LL.D. 8th Edition by JOSEPH G. PEASE, Barrister-at-law, and HERBERT CHITTY, Barrister-at-law. London: Sweet & Maxwell, Ltd., 3 Chancery Lane. Toronto: The Carswell Co., Ltd., 19 Duncan Street. 1911.

Broom's Legal Maxims is well known to every lawyer and law student. The original work was published in 1845 by Dr. Broom who died in 1882. In the preface to the original edition which is reprinted in the present edition, Dr. Broom explains the system adopted by him in arranging the legal maxims he selected for illustration and giving the reasons which led to its adoption. The main idea of the work is to present under the head of "Maxims" certain leading principles of English law, and briefly to illustrate some of the ways in which these principles have been applied or limited, by reference to a sufficient number of reported cases. The present editors aim to maintain and carry out the author's idea. They have incorporated in the book a selected number of the recent decisions and enactments which bear upon the principles discussed, and in order to give due weight to the fresh matter, they have occasionally re-arranged or modified a portion of the old. No attempt has been made to produce a new book.

Burge's Commentaries on Colonial and Foreign Laws, generally and in their conflict with each other and with the law of England. Under the general Editorship of ALEXANDER WOOD RENTON, a Justice of the Supreme Court of Ceylon, and GEORGE G. PHILLIMORE, Barrister-at-law. London: Sweet & Maxwell, Ltd., 3 Chancery Lane. Toronto: The Carswell Co., Ltd., 19 Duncan Street. 1910.

The present volume which is volume three of the new edition of this well-known work comprises the Law of Marriage and Divorce. Chapter one is entirely, and chapter four almost entirely new.

The Comparative Law of Marriage and Divorce. Under the general Editorship of ALEXANDER WOOD RENTON, a Justice of the Supreme Court of Ceylon, and GEORGE G. PHILLIMORE, Barrister-at-law. London: Sweet & Maxwell, Ltd., 3 Chancery Lane. Toronto: The Carswell Co., Ltd., 19 Duncan Street. 1910.

This work forms the third volume of the second edition of Burge's Commentaries on Colonial and Foreign Law, originally published in 1838, which deals with the laws of Marriage and Divorce in the principal legal systems of the world. Marriage is the most important branch of the law of persons, and the constitution of this status, its attributes and consequences as regards persons and property, and its dissolution during the lives of the spouses have always engaged in a pre-eminent degree the consideration of legislators and jurists. The international aspect of the status is now mainly regulated for the nations of Continental Europe by the recent Hague Convention of Marriage and Divorce, which, proceeding on lines generally accepted by jurists of all nations, has to some extent initiated an uniform private international law of marriage. The Anglo-Saxon nations, Great Britain and the United States, whose Courts are perhaps more familiar than those of any other countries with the problems of reconciling conflicting systems of law both external and internal, have not as yet taken any part in framing these international agreements for the regulation of conflicts between the different national systems.

Canada Legal Directory, 1911. Published annually in January, for lawyers and business men. Contains the names of Judges, lawyers, Court Officials, etc., throughout Canada and Newfoundland. R. A. WHARTON, Editor. Published by the Canada Legal Directory Company, 23 Toronto Street, Toronto, Canada.

This is the first volume of this Directory. Besides containing the names of Judges, lawyers, and court officials throughout Canada and Newfoundland, it gives first, a list of the various Canadian banks, second, a list of Chartered

Accountants, and third a list of Foreign Solicitors. Synopses of the laws of the various provinces are also to be found.

The Marriage Laws of the British Empire. By WILLIAM P. EVERSLEY and FRANCIS F. CRAIES, Barristers-at-law. London: Stevens & Haynes, Bell Yard, Temple Bar. Toronto: The Carswell Co., Ltd., 19 Duncan Street. 1910.

In dealing with the complex subject-matter of this work Mr. Eversley has written regarding the law of England and Ireland, and Mr. Craies of the law of Scotland, British Possessions and Protectorates. The principle adopted has been, first, to discuss the impediments to marriage, second, to set out what are the essentials of a good marriage irrespective of the religious beliefs of the contracting parties, and lastly, the registration of the marriage. In Part III. the statutory portion of the Marriage Laws of England, Ireland and Scotland are fully set forth so that the reader can find to his hand the text of any enactment dealing with marriage in those countries without being obliged to refer to the different volumes of the statutes in search for an authority in the text.

Canadian Reports (1909), Appeal Cases. Appeals allowed or refused by the Judicial Committee of the Privy Council on appeal from the Dominion of Canada. Arranged, annotated and edited by WALTER EDWIN LEAR, Barrister-at-law. Toronto, Arthur Poole & Co. 1910.

The principle adopted in this series of Reports is a very convenient one, namely, the giving of a report of all the judgments pronounced in the same case from the trial judgment and each successive appeal until the final judgment of the Privy Council is reached. The judgments are reported in their original text, and at full length. Seventeen cases are reported in the present volume, seven from Ontario, four from Quebec, three from British Columbia, two from Nova Scotia, and one from the Dominion Board of Railway Commissioners. Six appeals were from the Supreme Court of Canada, while eleven went direct from the Provincial Courts of Appeal to the Privy Council. Six cases reported are not reported or noted in any English legal publication.

A Summary of the Law and Practice in the Ecclesiastical Courts. By T. EUSTACE SMITH, Barrister-at-law. Sixth Edition. London: Stevens & Haynes, Bell Yard, Temple Bar. Toronto: The Carswell Co., Ltd., 19 Duncan Street. 1911.

This book has been written to give the student and general reader a fair outline of the scope and extent of Ecclesiastical Law, of the principles on which it is founded, of the Courts by which it is enforced, and the procedure by which these Courts are regulated. The present edition brings the book up to date by embodying in it the important alterations in the law which have arisen since the last edition appeared.

The Workmen's Compensation Act, 1906. With notes, rules, orders and regulations. By W. ADDINGTON WILLIS, Barrister-at-law. Eleventh Edition. London: Butterworth & Co., 11 & 12 Bell Yard. Toronto: The Carswell Co., Ltd., 19 Duncan Street. 1910.

This edition contains a reference to all the effective cases on the subject which have been decided by the appellate tribunals of Great Britain and Ireland, and which have been reported down to November 1st, 1910, with the exception of such Scottish decisions as involve only points of procedure. Some County Court cases have been noted as being either instructive or illustrative. Reference to some 360 new cases have been added to the text, but notwithstanding the book retains the handy form which hitherto has been much appreciated.

The Law of Torts. A Treatise on the English law of liability for civil injuries. By JOHN W. SALMOND, Solicitor-General for New Zealand, Second Edition. London: Stevens & Haynes, Bell Yard, Temple Bar. Toronto: The Carswell Co., Ltd., 19 Duncan Street. 1910. Price $6.

For the present edition this work has been revised throughout and such additions and alterations have been made as further consideration and judicial decisions of the last three years have shewn to be necessary. The law of co-owners is now dealt with for the first time, both in respect of their rights of action against strangers and in respect of their rights and remedies inter se. The question as to the possibility of successive actions for the same tort when that tort is actionable only on proof of actual damage

is discussed in a somewhat lengthy note. Similar treatment has been given to the difficult question as to the incidence of liability for the wrongful withdrawal of support to land in cases where the ownership or occupation of the supporting land has changed before the resulting subsidence takes place. The section dealing with the rule laid down in Earle v. Lubbock as to the liability of him who in breach of his contract with one person delivers a dangerous chattel which does harm to another person has been partially rewritten. The case of *Baker* v. *Snell* as decided by the English Court of Appeal has given occasion for a more thorough consideration of the rule of absolute liability for mischief done by animals. The subject of fair comment is also discussed. The aim of the author is to make the work a compendium of legal principles rather than a digest of judicial decisions.

The American Commonwealth. By JAMES BRYCE. In two volumes. New edition completely revised throughout, with additional chapters. Toronto: The Macmillan Company of Canada, Ltd. 1910. Price $4 net.

The first edition of this work appeared in 1888 and the author, Ambassador Bryce, now finds that so many changes have taken place in the United States, that a complete revision has become necessary and that some note ought to be taken of certain new phenomena in American politics and society. In this edition, there have been introduced, sometimes in the text, sometimes in supplementary notes concise descriptions of such phenomena. Four new chapters have been added dealing with the transmarine dominions of the United States acquired since 1888, a second with the huge influx of immigrants who have been arriving from Central and Southern Europe, a third with the more recent phases of the Negro problem in the South, and a fourth with the remarkable development in late years of the American Universities. The learned author expresses some anxiety in entering on its revision, fearing lest the hopeful spirit with which his observations of American institutions from 1870 to 1894 are inspired might be damped by a close examination of their more recent phases. But it is encouraging to note that all he has seen and heard during the past few years makes him more hopeful than ever for the future of popular government. The forces working for good seem

stronger to-day than they have been for the last three generations. This work should find a place in every lawyer's library.

The Law of Prohibition at Common Law and under the Justices Act. By H. R. CARLEWIS and D. S. EDWARDS, Barristers-at-law, with a chapter on the practice in England by F. J. WROTTESLEY, Barrister-at-law. London: Sweet & Maxwell, Ltd. Toronto: The Carswell Co., Ltd., 19 Duncan Street. 1910.

This work is by two learned Australian barristers. The introduction deals with common law prohibition, its definition, nature and origin. Then follow chapters in excess of jurisdiction, prohibition in aid, natural justice, restraint of spiritual Courts, misconstruction of statute law, restraint of public nuisance, matters immaterial and discretionary, whether writ discretionary or of right; when writ may be applied for; from and to what Courts the writ issues and the effect of granting or refusing the writ. Part II. is devoted to the parties, practice and costs in England. Owing to the fact that the authorities cited are from the Courts of various parts of the Empire the facts of the cases have been set out in more than usual detail, and extensive quotations have been given from the judgments.

Statutes of Practical Utility, passed in 1910, with notes. By W. H. AGGS, Barrister-at-law. London: Sweet & Maxwell, Ltd. Toronto: The Carswell Co., Ltd., 19 Duncan Street.

Of the statutes passed by the Imperial Parliament in 1910, twenty-one have been selected as of practical utility. The Finance Act, the last public statute assented to by the late King has been divided up and treated under those headings to which the various parts seemed most suitably to fall. The various rules and orders of a statutory character will be found in the appendix.

The Annual Digest of all the reported decisions of the Superior Courts, including a selection from the Scottish and Irish Courts during the year 1910. By JOHN MEWS, Barrister-at-law. London: Sweet & Maxwell, Ltd. Toronto: The Carswell Co., Ltd., 19 Duncan Street.

This thoroughly appreciated Digest with the "Noter-up" needs only to be mentioned. Any extended reference would be attempting to paint the lily.

The Solicitor's Clerk. Part I. A handy book for the ordinary practical work of a solicitor's office. Seventh and revised Edition. London: Effingham Wilson. Toronto: The Carswell Co., Ltd., 19 Duncan Street. 1910.

Law students will find that this little work contains very much practical information of considerable value to them in office work routine. While primarly adapted for the English solicitor's clerk, much of the material is readily applicable for use by students in law offices in this country.

CANADIAN NEWS.

G. F. Blair has severed his connection with the law firm of Proudfoot, Hays & Blair, Goderich, and has joined the law firm of Balfour, Martin & Casey, Regina, Sask.

The law students of Vancouver propose publishing a Law Students' Annual this month.

W. B. Allison, barrister, Strathcona, died on the 8th February.

C. E. Gregory, K.C., Antigonish, and B. L. Graham, barrister, Windsor, N.S., are removing to Prince Albert, Sask., where they will practise under the firm name of Gregory & Graham.

G. VanHorne has joined the law firm of Senkler, Spence & VanHorne, Vancouver.

Robert Orr, barrister, Duggan, Sask., has opened a law office at Macklim, Sask.

J. A. Archibald, barrister, has commenced practice at Kamloops, B.C.

A very interesting resolution was introduced at the September meeting of the Barristers' Society, N.B., whereby

persons who are members of the Massachusetts Bar should have the privilege to practise in New Brunswick, providing a similar privilege be allowed in Massachusetts to barristers enrolled in New Brunswick.

Reciprocity in tariffs may be a moot one, but reciprocity at the Bar must be met with sturdy opposition. We trust the resolution in question will be voted down. We think that the question of the permission of members of the various provincial Bars to practise in every province throughout Canada is one which should be taken up for consideration by the various law societies throughout Canada. We see no reason why a member, say of the Nova Scotia Bar, should not be allowed to practise in Ontario, British Columbia or any other province on presenting his certificate, and paying a nominal fee, without the necessity of waiting for any period of time to elapse and passing subsequent examinations. We would be glad to hear from any of our readers interested in this matter.

J. J. Gormully, K.C., died at Ottawa on the 24th February. The late Mr. Gormully was called to the English Bar by the Benchers of the Middle Temple, in 1873, and to the Ontario Bar shortly thereafter. He first practised at Goderich, but in 1875 removed to Ottawa. He was well-known as an authority on Banking Law.

The Vancouver law students held a banquet on the 19th February.

A. E. Dunlop, barrister, Wolfeville, will remove to Western Canada.

R. R. Munroe, barrister, Blairmore, Alta., recently died in that town.

R. A. Squires, barrister, St. John's, Nfld., is now practising alone.

A new law firm at St. John's, Nfld., is Kent & McGrath.

E. Sydney Smith, K.C., of Stratford, is acting as Deputy Judge of the county of Perth.

J. D. Gausby, of the law firm of Nesbitt, Gauld & Gausby, Hamilton, intends retiring from that firm to practise by himself.

L. A. Lovett, K.C., Sydney, N.S., intends to remove to London, Eng.

Towards the end of March the Law Students' Societies of Victoria, Vancouver, and of the Universities of the States of Washington and Oregon, will hold a competition law debate, the prize for which is a silver shield offered by the Lieutenant-Governor of British Columbia.

M. M. McMartin, barrister, Arthur, recently died near Fergus.

R. O. Stockton, Registrar of the Admiralty and Exchequer Courts, St. John, N.B., died on the 5th February.

V. B. Harrison, for several years past Police Magistrate of Ladysmith, B.C., has removed to Nanaimo, where he will practise law.

The law firm of Wood, McCausland & Turnbull, Regina, has been dissolved, Mr. Wood and Mr. Turnbull forming a new firm under the name of Wood & Turnbull.

J. A. McGillivray, K.C., died at Guelph on the 14th February. The late Mr. McGillivray for a number of years practised at Port Perry and Uxbridge.

The adjourned annual meeting of the Hastings County Law Association was held on Feb. 13th, 1911, when the following officers were elected for 1911:—Hon. President, W. N. Ponton, K.C.; President, F. E. O'Flynn; Vice-President, J. F. Wills, K.C.; Treasurer, P. McL. Forin; Secretary, M. Wright; Curator, W. C. Mikel, K.C.; Trustees, E. J. Butler, E. G. Porter, K.C., W. B. Northrup, K.C., W. N. Ponton, K.C., and M. Wright; Auditors, W. J. Diamond and W. Carnew; Representatives on the Council of Ontario Bar Association—The Hon. President, President, and Curator.

A hearty vote of thanks was passed to the retiring President, Col. W. N. Ponton, K.C., who has most ably filled the office for the past six years. The gift of a portrait of Judge E. B. Fralick to the library was suitably acknow-

ledged. The past year has been the most successful in the history of the Belleville Bar Association and nearly 200 volumes have been added to the library shelves.

Mr. J. Parker Thomas, K.C., was the first President of the Association.

The annual meeting of the Nova Scotia Barristers' Society was held on 23rd February, at the Court House, Halifax. The report of the council and the treasurer's report, and that of the librarian, shewed that the financial standing of the society was never better. The law library is very complete as to English, Colonial and Canadian reports, while the American reports are being constantly added to. The society was sorry to accept the resignation of J. W. P. Ritchie as treasurer, that gentleman being about to remove to Calgary, where he will practise his profession. The officers elected were the folowing:—

President, J. J. Ritchie, K.C.; Vice-President, J. A. Macdonald; Council, E. P. Allison, H. Mellish, K.C., J. C. O'Mullin, John T. Ross, K.C., J. L. Mackinnon, F. P. Bligh. Treasurer, T. S. Rogers, K.C.; Representative of Society on Court House Commission, F. H. Bell, K.C.; Examiner, T. J. Murphy.

On motion of Messrs. R. E. Harris and J. C. O'Mullin, a resolution of sympathy was passed to be forwarded to the family of the late Hon. M. H. Richey.

E. C. Kenning, of the law firm of Kenning & Cleary, Windsor, was married on the 28th February to Miss Hazel E. Thorburn of Detroit.

The fourth annual banquet of the Vancouver law students was held on the 22nd of February. A number of the Judges and leading lawyers of Vancouver were present.

Horace Pratt, of Ottawa, has been appointed Deputy Clerk of the Crown, Clerk of the County Court and Registrar for the Surrogate Court for the county of Carleton.

The Junior Bar Association of Montreal held their annual banquet on the 4th January.

F. Stone, of the law firm of Stone, Gundy & Bracken, Chatham, has been appointed Senior District Judge at Sault Ste. Marie.

The
Canadian Law Times.

VOL. XXXI. MAY, 1911. No. 5.

IMPERIAL AND INTERNATIONAL AFFAIRS.

BRITISH PARLIAMENTARY REFORM.—Mr. Frederic Harrison has unfolded a scheme to assuage the conflict between the two Houses of the British Parliament, which the *Times* styles "A Parliamentary Eirenicon." Failing to see the possibility at present of any satisfactory and thorough constitutional reform from which "a real Upper House," in other words, "an efficient Senate," would emerge, he asks: "Can we not rig up a sort of jury-mast in the gale?" The expedient he proposes is to form a Parliamentary Committee out of the Privy Council, and refer to it any bill on which the two houses fail to agree. Such a committee, not exceeding seventy-five, would be selected from the present members of the Privy Council, excluding royal or clerical councillors, as well as members of the House of Commons. The nomination to this committee would be made by the Crown, but only on the advice of ministers. It would stand as a Court of Arbitration in cases of deadlock between the two Chambers, holding, as Mr. Harrison conceives, some such place as the Supreme Court of the United States, which acts judicially in protecting the Constitution. Mr. Harrison is pleased to think that a "Parliamentary Committee of the Privy Council would hold a quasi-judicial function wholly removed from the spirit of an opposition party in the House of Lords acting as the ally of an opposition party in the Commons." With such an arbitral body between the hereditary and elective Estates he further believes that "the existing House of Lords might usefully exercise its familiar functions of reviewing foreign affairs, diplomatic and international questions, and would retain its ceremonial traditions without the need of internal reform or fresh legislation."

We fear there are many exceptions to be taken to Mr. Harrison's eirenicon. First and foremost, how could such a body be created, or exercise any authority, without "fresh legislation?" The Privy Council at large has long ceased to have any legislative powers, and it never even potentially possessed such a function as Mr. Harrison proposes his committee should exercise. Moreover, the history of the Privy Council has not been such as to commend it to the popular mind as a factor in constitutional reform. That history, at least from the sixteenth century onward, has been one of continuous retreat into desuetude before the advance of political liberty. The last time it was sought to be employed as a constitutional agent was in the Act of Settlement, the fourth clause of which provided that after the accession of the House of Hanover, all matters "relating to the well-governing of the kingdom, which were properly cognisable in the Privy Council by the laws and customs of the realm, should be transacted there; and all resolutions taken thereupon should be signed by such of the Privy Council as should advise and consent to the same." This measure, however, never became effective; for, to use the words of Taswell-Langmead, "it was soon perceived that this revival of the ancient authority of the Privy Council was an anachronism, and the clause was repealed early in Queen Anne's reign, before it could come into operation." Then, bearing in mind that members of the House of Commons are to be excluded, how could any Parliamentary committee (for that is Mr. Harrison's phrase) be composed of persons who are not members of Parliament? And how curious the reaction for a democratic community, in which the Sovereign has lacked the power to veto legislation for some two hundred years, to repose the ultimate power of law-making in the hands of an irresponsible and autocratic body! In passing, it may be observed that such a scheme would reduce the legislative office of the King to the vanishing point, and, if adopted, the statutes would probably read as being enacted by the "Parliamentary Committee, notwithstanding the dissent of the Lords Spiritual and Temporal, or the Commons" [as the case may be.]

At its best the scheme contemplates nothing more than an arbitral authority appointed at the instance of one of the parties at variance—the Ministry. The minority

of the Commons and the House of Lords would have no say in the appointments. And as we are persuaded that Mr. Harrison's suggestion is impossible and impracticable, so we think his "jury-mast" will not assist the navigation of the buffetted ship of state. The only way out of threatened disaster is to make the hereditary chamber of Parliament an "efficient Senate." We believe that this will be done as quickly as circumstances will allow; and meanwhile the British people will do well to heed Mr. Harrison's words:—"The urgent concern of all thoughtful men to-day must be to avoid the degradation of our historic Constitution into a Single-House democracy, with adult suffrage. That would open an era of anarchy and of impotence of which no man living would see the issue. To resist such a revolution as that every lover of his country, be he Tory, Whig, Liberal or Radical, might combine."

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POST INGENTIA FACTA.—Horace tells us that Romulus, and certain other worthies, were received into the temples of the gods after the performance of noble deeds. No one disputes the claim of the Right Honourable Mr. Haldane to a place in the House of Lords, but does his elevation mean the reform of that constitutional temple only, or its destruction? The new peer has it in his power to do much either in the way of rebuilding or demolishing the hereditary chamber; and we venture to believe that his policy will be reconstructive rather than destructive. The man who makes himself the instrument of saving the British constitution in the most momentous crisis of modern times will be an outstanding figure in the history of the world. The Secretary of State for War is one of those favoured mortals who can do many things, and do them all well. Before entering upon his distinguished parliamentary career, he had won first rank at the Bar and occupied a position of importance in literature. His literary industry has been largely expended in the field of philosophy, and the "Essays in Philosophical Criticism," translation (in collaboration with Mr. Kemp) of Schopenhauer's Die Welt als Wille und Vorstellung," and "Pathways to Reality" (Gifford Lectures), testify to the depth and abundance of his scholastic resources. As a Minister of the Crown his greatest achievement has been the creation of the "Territorial Force." Concerning this

body of citizen-soldiery Colonel Repington said at a recent dinner of the National Defence Association:—"The Territorial Force appeared to be about three times as good as the old volunteers, first, because it was well organized on the Regular pattern with all its arms and services, whereas the volunteers were not organized at all; secondly, because it was better commanded, trained and equipped, and had a definite role in the defence of the country; and, thirdly, because it had fewer wasters." "It is a far cry from the law Courts (not to mention the "studious cloister") to the War department, but Viscount Haldane has proved himself able to achieve distinction in all of these spheres. Viscount Haldane is a grand-nephew of the famous evangelists, Robert Haldane and James Alexander Haldane. He was born in 1856, and educated at Edinburgh University and at Göttingen.

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THE ARBITRATION OUTLOOK.—While official Germany apparently will have nothing to do with the Taft-Grey universal peace enterprise, it is a mistake to think that the alliance between Great Britain and Japan would necessarily interfere with the proposed arbitration treaty between Great Britain and the United States. Indeed, Mr. Bryce has formally denied that any such conflict would arise out of the British obligations to Japan; but the whole matter is set at rest by an official announcement of Baron Uchida at Washington, that the Japanese Government will cheerfully agree to the revision of any clause of the Hayashi-Lansdowne Treaty of 1905, which might interfére in any way with the negotiation of an Anglo-American arbitration agreement. This is a magnanimous thing for Japan to do, and goes a long way to dispel the "yellow peril" bogey in the United States. Nor does this cheerful surrender on the part of the Tokio Government of the tactical advantage against the United States which the Anglo-Japanese alliance may have spelled for it, lend much support to the story that President Diaz has connived at the present Mexican revolt as an ally of Japan, and for the purpose of giving that country a chance to challenge American intervention. If Japan is not sincere in her attitude toward the peace evangel, she has certainly reached the high-water mark of

diplomacy. If she has a rod in pickle for the United States she is not prepared to let the British see it just now.

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MEXICO AND THE UNITED STATES.—President Taft declared at Augusta that "the United States had determined that the revolution in the Republic to the south must end. The American troops have been sent to form a solid wall along the Rio Grande to stop filibustering, and to see that there is no further smuggling of arms and men across the international boundary." Now there is nothing in the Law of Nations, or in the neutrality laws of the United States, to prohibit the supplying of arms either to belligerents or insurgents, hence there is no need of "smuggling" them across the boundary. As to the smuggling of men, it is decided by *United States* v. *Kazinski* (2 Sprague 7), that persons leaving the United States with intent to enlist would not be violating the neutrality laws, although those laws do prohibit the hiring, within the United States, of any one to enlist for belligerent service in a foreign country. Mr. Taft will have to study the Law of Nations and the neutrality laws with much care, or his "solid military wall along the Rio Grande" may get him into trouble before this comment is in type.

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IRREGULARITIES IN EXTRADITION PROCEDURE.—In the case of *R.* v. *Governor of Brixton Prison* (27 T. L. R. 350), the K. B. Division, on March 20th, decided a point of much importance in the law of Extradition. A rule nisi had been obtained directing the governor of the prison to shew cause why one Ernest Edward Thompson should not be released from custody. Upon the facts it appeared that the prisoner had been arrested for obtaining money under false pretenses in France, under a provisional warrant issued in consequence of a requisition by the Secretary of State for Home Affairs under the Extradition Act of 1870. The ground upon which the rule had been obtained was that the requisition made by the Home Secretary was not accompanied by the depositions made before the Magistrate in France by whom the original warrant of arrest had been made. It was conceded that the procedure was regular so far as the Act was concerned, but it was contended on behalf of the prisoner that

the provisions of the Extradition Treaty between France and England had not been complied with. Article IX. provides that "a fugitive criminal may be apprehended under a warrant issued by any police magistrate . . . on such information or complaint, and such evidence, or after such proceedings as would in the opinion of the person issuing the warrant justify the issue of a warrant if the crime had been committed . . . in that part of the dominions of the two contracting parties in which the magistrate exercises jurisdiction." Art. VII. provides that the requisition for a warrant shall be accompanied by "duly authenticated depositions or statements taken on oath," &c. The prisoner's counsel contended that the Act and the Treaty must be read together, and that the provision of the latter with regard to depositions accompanying the requisition for a warrant formed a condition precedent to the validity of the proceedings in England. *Reg.* v. *Wilson* (3 Q. B. D. 42), was relied on. The Attorney-General, contra, relied on *In re Counhaye* (L. R. 8 Q. B. at p. 415), contending that the only question was: Had the London magistrate jurisdiction to arrest the prisoner? The Court (Ridley, Darling and Channell, JJ.), discharged the rule, holding that the point relied upon by the applicant was only one of procedure and not of jurisdiction; and that the question whether or not the terms of the treaty had been complied with did not affect the jurisdiction of the magistrate. So long as the magistrate had issued his warrant within the Act, the Court would not go behind it.

CHARLES MORSE.

FREE INSTITUTIONS.

The old proverb says that "you may bring a horse to the water but you can't make him drink." So it is also true that it is possible to give a people free institutions, but you cannot make them use them against their will.

"Free institutions," as we understand them in the political sense, mean that the people to whom that treasure is committed have entrusted to them the power to make their own laws, and to maintain amongst themselves truth and justice, so that every man is protected in his just rights, and no man or body of men is allowed with impunity to violate the law, or to tyrannize over others. Whenever a community having such powers, so utilizes them as to enable one class of the community to violate the ordinary principles of law and justice, and to tyrannize over individuals with impunity, it is acting falsely to its trust, and, having the power to be free, it is in effect electing to be a community aiding and abetting principles calculated to undermine all freedom and justice.

The province of Quebec, like all other provinces of the Dominion, has this supreme gift of free institutions; it is like all other provinces empowered to make and to execute its own laws in all matters of provincial concern, and like all other provinces, if it is true to itself, it will jealously guard that most sacred right and duty; this must be done not merely by the Legislature, which ought to refuse to enact any law which enables any man, or any class of men, to act unjustly, but also by all law abiding citizens called to take part, by virtue of their citizenship, in the administration of justice. Juries can no more forsake their duty and violate their oaths, without baleful consequences, than can Judges or legislatures. But the Legislature, some Judges, and some juries in the province of Quebec, seem to have an imperfect regard for the demands of justice in their desire to be subservient to their ecclesiastical authorities. According to them, injustice, if practised by ecclesiastics, is to be tolerated; and law, in the supposed interest of ecclesiastical authority, is to be set at naught by both Judge and juries. That is not the way freedom is maintained; that is not even the true way for preserving "the rights of the Church." The Church has no "rights" which are not in

accordance with the principles of truth and justice; it has no "right" to perpetrate wrong in the name of religion; and any legislature which aids and abets it in doing so, is merely forging fetters for those whom it is its sacred duty to protect.

In the year 1869 a Roman Catholic parishioner of the city of Montreal died. He was a member of the "Institut Canadien," a literary society which had incurred ecclesiastical censure, and during his life a pastoral letter of the Roman Catholic Bishop of Montreal had forbidden such membership on pain of being deprived of the Sacrament "*meme à l'article de la mort.*" This gentleman, however, continued to be a member of the institute till his death. At his death the curé of Montreal refused to give his remains ecclesiastical burial in the consecrated part of the cemetery, but he offered burial without rites in an unconsecrated part of the cemetery reserved for unbaptized infants and criminals. The deceased had never been tried by any ecclesiastical authority in his lifetime, and his relatives refused to consent to this indignity which the ecclesiastical authorities desired to impose on his remains. A lengthy litigation took place to compel the burial of the deceased in consecrated ground with religious rites, the claim to the latter being ultimately waived. Mr. Justice Mondelet gave judgment for the plaintiff, but his decision was reversed by the Court of Review, whose judgment was affirmed by the Court of Queen's Bench; but on appeal to Her late Majesty in Council the judgment below was reversed and the remains of the deceased were ordered to be buried in that part of the cemetery where persons entitled to ecclesiastical burial were usually interred.

The ground of their Lordships' decision, we should have thought, would have approved itself to the good sense of all reasonable men. It was simply and solely that the deceased had never been tried or condemned in his lifetime of any ecclesiastical offence, and it was too late after his death to try him. He had died having the status of a Roman Catholic in good standing, and to make war upon him after his decease when he was no longer able to be heard in his defence, merely for the purpose of putting an affront on his remains and on his widow and relatives, was neither law nor justice. Whatever view ecclesiastics might take of such proceedings, one would think that there would be enough

enlightened members of the Quebec Legislature with a sufficient sense of justice to appreciate both the wisdom and justice of the decision, as to have made it impossible to legalize, or attempt to legalize, acts such as were found to be illegal in the case above referred to. But what do we find? In the year following this decision the Quebec Legislature enacts an amendment of the Code: "66a. It belongs solely to the Roman Catholic ecclesiastical authority to designate the place in the cemetery in which each individual of such faith shall be buried; and if the deceased cannot, according to the canon rules and laws, in the judgment of the ordinary, be interred in ground consecrated by the liturgical prayers of such religion, he receives civil burial, in ground reserved for that purpose and adjacent to the cemetery." The object of this enactment, of course, is to give to the Roman Catholic clergy, without appeal, the power to sit in judgment on deceased parishioners, and to offer to their remains such indignities as they may see fit in the way of burial.

In the recent case of *Hébert* v. *Clouston* a Judge in the province of Quebec determined that two Roman Catholics married before a Protestant minister were not married at all, that their marriage was a nullity, and that for three years the parties had been living together in fornication, although the Code makes no limitation as to persons between whom Protestant ministers may solemnize matrimony. This seems to be nothing less than the assumption on the part of the Judge of the power to pronounce a divorce for an insufficient cause, having no jurisdiction whatever so to do. Here, again, appears to be a violation of free institutions, and accepting as a law-giver an alien authority and power, having no legal power to make laws which in any way conflict with the laws of the land.

Lovers of liberty and freedom may well ask where is such a state of things likely to lead?

We have still another case occurring lately in Montreal displaying a similar spirit on the part of a jury. Three men were tried for highway robbery. The Judge charged the jury as follows: "Gentlemen of the jury, the proof is perfectly sufficient. Lemieux took part in an atrocious attempt on liberty. . . . It was a bandit's trick. Do your duty. If you are honest and intelligent you cannot do otherwise than report a verdict of guilty against the accused." Nevertheless the jury brought in a verdict of "not guilty." The

crime committed was the robbery of Ludger Larose, secretary of a Freemason Lodge, of money and papers, and the accused pleaded in excuse that they were acting in the interests of the Roman Catholic Church!

The celebrated artist Benvenuto Cellini relates that a pope, in his day, gave him absolution for all murders that he should commit in the interests of the Church; but we were in hopes that we had got a long way beyond that standard of morality in these days: but it seems it is possible for a jury of French Canadians to absolve a highway robbery committed "in the interest of the Church," even in the 20th century.

We can only say that is not the British way of maintaining free institutions. It is not either the true way of upholding the honour of the Roman Catholic part of the Church. To proclaim that any part of the Church requires, or is benefited, by criminal acts, or that it is possible that in its interest criminal acts should be committed, or condoned, is one of the most grievous insults that can be offered to any part of the Christian Church.

K. C.

THE LATE LORD COLLINS, LORD OF APPEAL.

By the death of the late Lord Collins the legal world has suffered a substantial loss. At the Bar his was not the glory of the popular orator, nor the fame of the subtle cross-examiner. On the Bench he was not one of those Judges whose personality touches the lay imagination. But to the lawyer, Richard Henn Collins was one of the great line of masters in the law, to whose lives he looks for inspiration, and to whose works he turns for guidance.

That Lord Collins was a diligent student is obvious: from his arguments and judgments, with their wealth of authority and their reasoned application of established principles; from his intellectual activities outside his profession; and from the work by which his name first came before the legal public in general, the seventh edition of "Smith's Leading Cases." But more than diligence must be possessed by the man who is to pass through all the grades of professional promotion, with no other cause for

advancement than professional attainments, accomplishments and character. Natural endowment counts for as much in the study and practice of the law as in any other department of human endeavour; and how discordant soever may be the views and theories of the professed students of heredity, it cannot be doubted that Lord Collins' success in his career was in no small degree due to the fact that his father, Mr. Stephen Collins, Q.C., of the Irish Bar, and his maternal grandfather, William Henn, a Master in Chancery, were both men of eminence in the same calling.

Born in 1842, the future Lord Collins went from Dungannon Royal School, a famous Irish seminary, to Trinity College, Dublin, and after obtaining a classical scholarship there in 1861, migrated to Downing College, Cambridge, where he was graduated as fourth classic in 1865. In the same year he was elected to a Fellowship, and twenty years afterwards to an honourary Fellowship.

In November, 1867, he was called to the Bar at the Middle Temple, and joined the Northern Circuit, where he was the contemporary of Charles Russell, Farrer Herschell, William Court Gully and A. V. Dicey. Nine years after his call he produced, in collaboration with Robert George Arbuthnot, the edition of "Smith" to which reference has been made. His selection, at a comparatively early age, for a task in which his predecessors (in respect of the third and fourth editions) had been "James Shaw Willes and Henry Singer Keating, of the Inner Temple, Esquires (afterwards Judges of Her Majesty's Court of Common Pleas and Members of Her Majesty's Privy Council)" (as the title-page of the seventh edition has it), shews that his ability was already recognised; and the studies involved in the execution of that task must have contributed materially to the wide and deep knowledge of case-law for which the late Judge was renowned.

In 1883, seven years after the appearance of that work (the only extensive literary undertaking for which he ever had sufficient leisure) Henn Collins took silk, and acquired a large practice, chiefly in matters involving complicated business details, such as railway contracts and regulations, local government disputes, and commercial cases.

The last great lawsuit in which he appeared (*Sharp* v. *Wakefield*, [1891] A. C. 173), was one that came to the knowledge of more persons, and was more widely canvassed

than perhaps any other non-political or non-criminal litigation of the century. Its purely legal interest is very limited, turning, as it did, simply on the administrative duties of a local authority. The House of Lords held, ultimately, that upon an application for the renewal of the license of a public-house, the licensing justices might, in the exercise of a judicial discretion, take into consideration not only the character of the licensee and the mode of management of the house itself, but also such extrinsic matters as the needs and character of the neighbourhood, and the possibility of efficient police supervision. But the question at issue strongly interested the temperance party, who followed the varying fortunes of the case from Court to Court with close attention, and were delighted with the decision of the Lords, since it tended towards larger powers of restriction of licenses by the justices, and towards diminishing the growth of a "vested interest" in a license, by rendering each renewal subject to the same conditions as effected the original grant. Collins appeared before the Lords for the unsuccessful appellants. The cases were not rare, indeed, in which he was on the losing side; and perhaps his very rectitude of judgment, both in respect of the facts and the law of a case, tended somewhat to hamper him in fighting a losing battle.

Less than a month after the conclusion, in 1891, of *Sharp* v. *Wakefield,* Collins was selected to succeed Sir James Stephens on the judicial bench. The appointment was universally approved. As the *Times* said, in its obituary notice, "It is hardly too much to say that he was appointed as much by the profession as by the Lord Chancellor." Three years later, in 1894, he became the president, as judicial member, of the Railway and Canal Commission, on the retirement from that office of Mr. Justice Willes.

One of Mr. Justice Collins' most famous decisions is a typical example of a class of case which is peculiarly interesting to those students of law who delight in close reasoning and the triumph of dialectic. An article, long manufactured by one Reddaway, had become identified in the trade with the name "Camel Hair Belting." Justice Collins, at the suit of Reddaway, granted an injunction to restrain another manufacturer from the use of the words "camel hair" in such a manner as to deceive purchasers. The decision was reversed by the Court of Appeal on the ground

that the appellant had a right to manufacture the article he had sold, and to sell it under the name "Camel Hair Belting," which, in fact, accurately described it. "A man cannot be restrained," said Lord Esher, M.R., "from telling in the course of business, that which is the simple truth." The Lords however, restored the original judgment, Lord Halsbury stating the rule on which it was based with that blunt downrightness which sweeps away the cobwebs of legal sophistry, and is the strength and glory of the common law: "For myself, I believe the principle of law may be very plainly stated, and that is, that nobody has any right to represent his goods as the goods of somebody else" (*Reddaway* v. *Banham,* [1896] A. C. 199). In fluctuation of judicial decisions, and in the ultimate establishment in the Lords of a simple, sound, intelligible rule, after bewildering entanglement, *Reddaway* v. *Banham* recalls the great case of *Vagliano* v. *Bank of England,* ([1891] A. C. 107). Here, however, the decision of the Judge of first instance, though confirmed on appeal, was reversed by the House of Lords. The point in dispute, which was as elusive as that in *Reddaway* v. *Banham,* was whether a bill which is a forgery in all particulars but the acceptance, obtained by fraud, and naming as payee a person well known to and having extensive dealings with the acceptor, could be said to be a "fictitious payee" within the Bills of Exchange Act, 1882. On the one hand, it was held by the Court of Appeal that the payee, being an existing person well known to the acceptor, could not be called fictitious; on the other, it was decided by the House of Lords that a person can only be constituted a payee by the drawer's intentions, expressed in a prescribed manner, and that here no such intention existed.

But a few years elapsed, and in 1897 Mr. Justice Collins became a Lord Justice of Appeal, and was speedily immersed in the flood of litigation that followed on the passage of the Workmen's Compensation Act of 1897, since repealed, but replaced in 1906 by another of more comprehensive scope. That statute belonged to a different order of ideas from those in which Lord Justice Collins and his colleagues had been trained, and reversals by the House of Lords of their decisions upon it were not infrequent. The Act, indeed, was tentative and unsystematic; it applied to a limited number of trades, and permitted workmen, under certain

circumstances to contract themselves out of its benefits. Its successor carries out its principles more consistently, but those principles themselves are not in harmony with the common law, which bases civil liability either on contract or on the violation of a duty, and by contract means a set of rights and duties framed, within the limits imposed by morality and public policy, by the parties themselves. The common law liability of an employer to any one of his servants, not only for his own negligence, but also for that of another of his servants, was limited, no earlier than 1837, by the much-discussed case of *Priestley* v. *Fowler* (3 M. & W. 1), which established the exceptional doctrine of "common employment." A partial remedy for this unsatisfactory rule was provided by the Employers' Liability Act of 1880. In 1893 there was introduced in the House of Commons a bill on the same subject, which proved abortive, and is now chiefly memorable for the amendment which was moved by the Right Honourable Joseph Chamberlain on the second reading: "That no amendment of the law relating to employers' liability will be final or satisfactory which does not provide compensation to workmen for all injuries sustained in the ordinary course of their employment, and not caused by their own acts or default." This was withdrawn, but its principle was embodied in the Act of 1897. By this Act, for the first time in the history of English law, a liability was cast upon an individual to pay compensation for personal injuries which are not the result of any negligence or other wrongful act, either of himself or if his servants, for whose conduct he is legally responsible.

From 1901 to 1907 Sir Richard Henn Collins, besides being appointed chairman of the Historical MSS. Commission, held the high office of Master of the Rolls, taking part *inter alia*, in 1906, in the much-discussed case of *Board of Education* v. *County Council of West Riding of Yorkshire*, ([1907] A. C. 29), which aroused keen popular interest by reason of its trenching upon the thorny domain of religious instruction. The point decided was, in brief, that a local education authority does not "maintain" a non-provided school under the Education Act of 1902, where it refuses to make reasonable payments in respect of denominational religious instruction lawfully given during school hours.

Finally, in March, 1907, he was appointed a Lord of Appeal in the place of Lord Davey, who had died in the pre-

vious month, and was created a life peer with the title of Baron Collins of Kensington in the county of London.

But before his elevation to the peerage, Sir Richard Henn Collins, M.R., had been associated with a case that caused world-wide commotion, and came painfully near to being a scandal on the administration of English criminal justice.

In 1896 a Mr. Beck, of Swedish origin, was convicted at the Old Bailey and sentenced to seven years' penal servitude. Evidence was given at the trial that by means of false pretences and trickery he had possessed himself of property belonging to various loose women, a number of whom identified him with varying degrees of confidence. His defence was that he had been wrongly identified, and that the real culprit was a man named Smith, who had been convicted of similar offences in 1877, and he presented a number of petitions for the reopening of the case, but without success. In 1901 Mr. Beck was released on license, and in 1904 again arrested on a similar charge, and again convicted on that charge and also of the previous conviction. Mr. Justice Grantham, however, who tried the case, was not satisfied; he postponed sentence until the following session, and in the meantime Smith, the convict of 1877, was arrested for acts like those charged against Mr. Beck, but committed while the latter was in custody; and inquiry fully proved the innocence of Mr. Beck and the cause of the terrible injustice that had been inflicted upon him. He was pardoned in respect of both convictions, and received £5,000 as pecuniary compensation.

It was universally felt that something must be done to diminish the risk of so lamentable a miscarriage of justice, and, as a first step in that direction, a departmental committee was appointed by the Home Secretary to inquire into and report upon the case. The committee was admirably constituted: Sir Richard Henn Collins, M.R., chairman, Sir Spencer Walpole, K.C.B., and Sir John Edge, K.C., a member of the Council of India, and late Chief Justice of the High Court of the North-Western Provinces of India.

The language of the report of the committee which combined mildness of expression with a sufficiently pungent meaning, seems to point to the Master of the Rolls as its author. "Though it is possibly beyond our power to suggest it," said the committee, "may not the time have come for abolishing the anomaly of pardoning a man who never

ought to have been convicted, and adopting the simpler remedy of quashing the conviction on motion by the Attorney-General and entering an acquittal as of record?" It is noteworthy that the late Sir Frederick Pollock, when Attorney-General, had long before made a similar suggestion. Improvement in the system of registering the marks on prisoners was also advised; and not without good grounds, for Smith was circumcised, and Mr. Beck was not.

The above report undoubtedly hastened the reform of the criminal law that had for years been in contemplation (between 1844 and 1906 at least twenty-eight bills had been introduced in Parliament for the purpose), and that was finally carried out by the Criminal Appeal Act of 1907. This Act revolutionised English criminal procedure. It established for the first time a Court of Criminal Appeal for persons convicted on indictment. It gave to a convicted person the right to appeal to that Court on any matter of law, and also the right to apply to a Judge thereof, and on appeal from him to the Court, for leave to appeal against his conviction on a question of fact or a question of mixed law and fact, or on any other ground which would go to shew that his conviction was wrong. Sentences also may be appealed against; while, on the other hand, the prosecution was for the first time in criminal procedure given the right to appeal against an acquittal of the prisoner, a right that has just been successfully vindicated in the important case of *R.* v. *Ball* (6 Cr. App. R. 54.)

Another function of high public importance, not lying strictly within his judicial sphere, that Lord Justice Collins performed with advantage to his country, was that of acting as arbitrator on the Venezuela boundary question in 1897. In the same year he was sworn of the Privy Council.

Of Lord Collins' industry, learning and independence of judgment in the discharge of his duties in the House of Lords, no better example could be found than the case of *Addis* v. *Gramophone Co., Ltd.* ([1909] A. C. 488). He was there in a minority of one, against Lord Loreburn, L.C., and Lords James of Hereford, Atkinson, Gorell, and Shaw of Dunfermline, on the question whether a servant who is wrongfully dismissed from his employment is entitled to claim, as damages, compensation for his injured feelings in respect of the manner of his dismissal, or for the loss that he may sustain from the fact that the dismissal of itself

makes it more difficult for him to obtain fresh employment. In support of his opinion that such damages should be recoverable, Lord Collins cited and discussed all the authorities in point—though it is true that they were scanty— and marshalled them with such effect that the reader is apt to wonder that the decision of the House was not otherwise than it was. In truth, Lord Collins' coldly intellectual temperament, ideal lawyer as it made him, did not make for that compelling power that sometimes resides in men of lesser mental gifts; nor could it ever be said of him, as a French jurist once remarked of Mr. Justice Bayley, *"Il s'amuse à juger."*

In the Upper House, however, Lord Collins was unable, from physical reasons, fully to maintain his great reputation. His vital forces were now sadly waning. In 1910 he resigned his office on account of ill-health; and it was but three months later, on the 3rd of January, 1911, that he breathed his last.

In these days, when the rival claims of classics and science to predominate in the educational curriculum are being urged with some warmth, it may be instructive to note that Lord Collins, like so many other of the greatest English lawyers, preserved, through all the stress of a busy life and an absorbing vocation, a living and active interest in classics and humane letters. He accepted the first presidency of the Classical Association, in 1904, and threw into the work of the association the same energy and practical good sense that marked his every undertaking. He frequently attended the meetings of the association, taking an active part in its business, and especially in the framing of its constitution and rules, where, of course, his assistance would be invaluable. He took the chair at the Oxford general meeting in 1904, and in his opening speech gave the keynote of the association as "Defence not Defiance." Nor was his sympathy with the association content with these public services. In private, too, he consolidated and promoted its interests by a warm personal friendship with its leading spirits, who will long remember his gracious hospitality with a special sense of loss.

The leading English centres of learning were eager to enroll Lord Collins among their members; he was Hon.

LL.D. of Dublin and Cambridge; Hon. D.C.L. of Oxford; Hon. Litt.D. of the University of Manchester.

The Temple, and his own Inn in particular, delighted to do him honour. He became a Master of the Bench of the Middle Temple in 1885, and served the office of treasurer in 1905; and on his death a touching eulogy on the late Judge was pronounced by the Master of the Temple, the Rev. Dr. Woods, preaching in the Temple church. "Of all his gifts," he said, "one would put highest, perhaps, a certain quiet charm of character which won the esteem and affection of all who knew him well. He always seemed as if he might have taken for his motto the prophet's words: 'In quietness and confidence shall be your strength.' He had all the strength of a quiet and serene nature. His good, quiet talk and simple, quiet manner, were free from the slightest tinge of personal self-assertion, and one felt that the grace of unobtrusiveness was never displayed to greater advantage than when it was seen in a really eminent man."

The personality of Lord Collins accorded with the character of his life's work. Of simple tastes and habits, he was at one time often to be seen, during the midday rising of the Courts, lunching frugally at "Groom's," that little, old-fashioned coffee-house, squeezed up against one of the gates of the Temple, in Fleet Street, that is so familiar to the lawyers who practise in its vicinity. His hours of recreation were given to fishing, the sport of the contemplative man; to golf, the brain-worker's athletics; to cycling and shooting, as well as to companionship with the masterpieces of literature. His hospitality and personal kindness have left many mourners, besides the numerous company that followed his body to the grave.

Lord Collins, who married in 1868 Jane, daughter of the Very Rev. Ogle William Moore, Dean of Clogher, leaves a widow, two sons and three daughters. The eldest son, a soldier, Captain Richard Henn Collins, D.S.O., Royal Berkshire Regiment, served with distinction in the war in South Africa; the younger, Mr. Stephen Ogle Henn Collins, has adopted his father's profession.

E. C. ROBINSON.

IMPLIED WARRANTY OF AUTHORITY.

The more one considers the judgment of the Court of Appeal in *Yonge* v. *Toynbee* (1910), 1 K. B. 215, and *Simmons* v. *Liberal Opinion, Ltd., In re Dunn*, noted elsewhere, the more one realizes the important and far-reaching effects of the principle laid down in *Collen* v. *Wright*, 27 L. J. Q. B. 215, which may be shortly stated as follows:—Where an agent in good faith assumes an authority which he does not possess, and induces another to deal with him in the belief that he has the authority which he assumes, he makes himself personally liable for the damages sustained by such other as the result of his so dealing. In the leading case an action was brought against the executors of A., who had signed an agreement, describing himself as the agent of B., to grant to the plaintiff a lease of a farm belonging to B. Both the plaintiff and A. believed at the time that A. had authority from B. to make the agreement, but A. had not, in fact, that authority. B. having refused to grant the lease, the plaintiff sued him for specific performance, but the suit failed because A. had no authority from B. Upon these facts it was held that the plaintiff was entitled to recover from A.'s executors as damages, the costs of the suit in equity, which was held to have been properly brought, as being damages naturally resulting from A.'s implied misrepresentation. Mr. Justice Willes in giving judgment said: "I am of opinion that a person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of the authority being untrue. The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith of the professed agent being duly authorised, that the authority which he professes to have does, in point of fact, exist."

If, of course the agent knew at the time that he had no authority, he would render himself liable in an action of deceit to the person who suffered damage in consequence of acting on such misrepresentation. (*Polhill* v. *Walter*, 1 L. J. K. B. 92.)

The principle laid down in *Collen* v. *Wright* has been repeatedly followed in cases too numerous to mention, and seems reasonable enough, but of recent years it has been extended in such an alarming manner that one feels compelled to ask "when is it going to stop?" The liability was by the decision in the leading case, applicable to cases in which a contract was brought about by the innocent assumption of a non-existent authority, but more recent cases have extended the liability to every transaction, contractual or otherwise, brought about by such an assumption. Thus, in *Firbank* v. *Humphreys*, 18 Q. B. D. 54, by an agreement made between a company and a contractor engaged under a contract in carrying out works for the company, it was agreed that in consideration that the contractor would proceed with the works, the company would issue to him, in discharge of a debt then due to him under the contract, debenture stock of the company. Certificates of debenture stock were thereupon signed by two of the directors and issued to the contractor. The company had, at the time, exhausted its power of issuing debenture stock, but the directors were ignorant of the fact. Held, in an action by the contractor against the directors for breach of an implied warranty that they had power to issue valid debenture stock, that the directors were liable, and that the damages were the nominal value of the debenture stock purported to be issued. "The rule to be deduced," said Lord Esher, M.R., "is that when a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is personally liable for the damage that has occurred."

Again, in *Oliver* v. *Bank of England* (1902), 1 Ch. 610, affirmed by the House of Lords *sub nom. Starkey* v. *Bank of England* (1903), A. C. 114, a stockbroker applied to the Bank of England for a power of attorney for the sale of Consols, believing himself to be instructed by the stockholder, and *bona fide* induced the bank to transfer the Consols to a purchaser upon a power of attorney to which the stockholder's signature was forged. Held, that the broker must be taken to have given an implied warranty that he had authority, and that he was therefore liable to indemnify the

bank against the claim of the stockholder for restitution. It was argued in this case that the rule in *Collen* v. *Wright* did not extend to cases where the agent did not know he had no authority and had not the means of finding out, but this was rejected, and it was also laid down that the rule is in no way affected by *Derry* v. *Peek*, 14 App. Cas. 337, and applies not only to contracts but also to any business transaction into which a third party is induced to enter by a representation that the person with whom he is doing business has the authority of some other person.

In *Sheffield Corporation* v. *Barclay* (1905), A. C. 392, a banker in good faith sent to a corporation a transfer of corporation stock which subsequently proved to be a forgery. It was held by the House of Lords that both parties having acted *bona fide* and without negligence, the banker was bound to indemnify the corporation against their liability to the person whose name had been forged, upon the ground that there was an implied contract that the transfer was genuine. This was considered by Lord Davey to be the result of the decision in *Oliver* v. *Bank of England* (1902, 1 Ch. 610.)

Then we get the case of *Yonge* v. *Toynbee*, decided last year, and reported (1910) 1 K. B. 215, which we thought would be regarded as the high-water mark in the extension of the doctrine. Before the commencement of the action in question, the defendant had instructed a firm of solicitors to act for him, and had subsequently become of unsound mind. After the issue of the writ the solicitors, not knowing that the defendant had become insane, and acting on the original instructions, entered an appearance for the defendant, and pleadings were delivered, and various interlocutory proceedings took place. After notice of trial had been given, the solicitors for the first time discovered that the defendant had become of unsound mind, and informed the plaintiff. The latter took out a summons for an order that the appearance and all subsequent proceedings should be struck out and that the solicitors should pay the plaintiff's costs. The Court of Appeal held that the plaintiffs were entitled to such costs on the ground that a person who professes to act as an agent, impliedly contracts that he has authority and is liable for a breach of that implied contract, even though the facts are that he originally had authority but that his authority has come to an end (the lunacy, of

course, determined the authority) by reason of facts of which he has no knowledge or means of knowledge. This is truly a startling decision, and one which affects solicitors not a little. It will be necessary for them in future to get express instructions periodically, apparently, throughout the course of an action, to make sure that their authority has not been in any way determined, otherwise they may find themselves landed in costs. Nay, further, may we not say that, strictly speaking, to be absolutely safe the solicitor should when receiving instructions stipulate for a medical examination of his client in order to be quite certain of the latter's sanity!

The old case of *Smout* v. *Ilbery*, 12 L. J. Ex. 357, which was followed as recently as 1900 in *Salton* v. *New Beeston Cycle Co.* (1900), 1 Ch. 43, has long been considered as an authority for the proposition that when a principal gives an agent a continuing authority to make contracts for him, and the agent continues to act after the revocation of the authority but without knowledge of its revocation, the agent incurs no liability towards any person with whom he has made any such contract. This cannot now be considered good law. In fact Buckley, L.J., in his judgment sums up the law as follows:—"The liability of the person who professes to act as agent arises (a) if he has been fraudulent, (b) if he has without fraud untruly represented that he had authority when he had not, and (c) also when he innocently misrepresents that he has authority when the fact is either (1) that he never had authority, or (2) that his original authority has determined by reason of facts of which he has not knowledge or means of knowledge."

Lastly, in the recent case of *Simmons* v. *Liberal Opinion, Ltd.*, damages for libel to the tune of 5,000*l.* were awarded to the plaintiff. At the trial it appeared that the defendants were not registered either under the Industrial and Provident Societies Act, 1893, or under the Companies Act, and in fact had no legal entity. An application was made for an order that the plaintiff's costs should be paid by the solicitor for the defence on the ground that he, by entering appearance and conducting the defence, impliedly warranted that he had a client, whereas, as a matter of fact, he had no client recognized by the law. The solicitor, giving evidence, stated that he had been properly instructed by responsible persons interested in "Liberal

Opinion," and that he assumed that he was acting for a duly registered company, and did not become aware that such was not the case until the trial. Mr. Justice Darling declined to make the order, but the matter has since been brought before the Court of Appeal, and they have reversed the decision in the Court below, relying on the above-mentioned case of *Yonge* v. *Toynbee*. The contention that the solicitor had some persons as clients for whom he was authorised to act was brushed aside on the ground that, if such was the case, appearance should have been entered in the action in their own names, instead of in the name under which they carried on business, as required by Ord. XLVIIIA. r. 5.

Thus a new terror is added to the already onerous liabilities and duties of solicitors. The principle involved is one of extreme importance to the legal profession, and the result of these far-reaching decisions must be fully realised. We certainly think that the implied warranty of authority theory has been carried too far in the two last decisions of the Court of Appeal; let us hope that it will not be extended any further.

OPTIONS OF PURCHASE CONTAINED IN LEASES.

The effect of *Woodall* v. *Clifton* on the Rule in *Lawes* v. *Bennett*..

In *Lawes* v. *Bennett* (1 Cox 167), an owner of land demised it for seven years, and agreed with the lessee that he should have the option, before the end of the term, of purchasing the fee simple at a certain price. The lessor died before the option was exercised, having given his real and personal estate to different persons; after his death the option was exercised by an assignee of the lessee, and the fee simple was conveyed to him accordingly. Lord Kenyon, M.R., held that the exercise of the option related back to the date when it was created, and that the purchase-money went as personal estate of the lessor. The Master of the Rolls, remarked, very truly, that the principles upon which the case depended were perfectly clear, and that if he was wrong it must be by misapplication of those principles.

"It is very clear," said the Master of the Rolls, "that if a man seized of real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is, that it is left to the election of (the lessee) whether it shall be real or personal. It seems to me to make no distinction at all. Suppose a man should bargain for the sale of timber, provided the buyer should give proper security for the payment of the money. This, when cut down would be part of the personal estate, although it depends upon the buyer whether he gives security or not." This illustration shews a forgetfulness of first principles on the part of the learned Judge which is almost incredible. He seems to have thought that in the second case put by him the buyer could refuse to give security and then say that there was no contract, although it is obvious that the stipulation as to security was inserted for the protection of the seller; he could, therefore, waive it, and sue the buyer for the price of the timber: *Markham* v. *Stanford* (14 C. B. N. S. 376). A contract of sale which the seller can enforce at will, as in both the cases put by Lord Kenyon, is a totally different thing from an option granted for valuable consideration which binds only one of the parties, and does not give rise to a contract until it is exercised.

The decision in *Lawes* v. *Bennett* was defended by Wood, V.-C., in *Weeding* v. *Weeding* (1 J. & H. 424), but his reasoning is not convincing. According to the Vice-Chancellor it does not much matter what the rule of law is with regard to constructive conversion, for every testator is presumed to know it, and can provide against it if he does not like it. On the other hand, *Lawes* v. *Bennett* has been treated, and rightly treated as contrary to principle and common sense by Lord Eldon in *Ripley* v. *Waterworth* (7 Ves. 425), and *Townley* v. *Bedwell* (14 Ves. 591); by Kindersley, V.-C., in *Collingwood* v. *Rew* (3 Jur. N. S. 785); by Fry, J., in *Edwards* v. *West* (7 Ch. D. 858); by Chitty, J., in *Re Isaacs* (1894, 3 Ch. 506); and by Neville, J., in *Re Dyson* (1910, 1 Ch. 750). Nevertheless the decision has never been overruled, and it has stood so long that its reversal may be looked upon as hopeless: see *Re Adams and Kensington Vestry* (27 Ch. D. 394.)

The suggestion has, however, recently been made (1 White & Tudor L. C. (8th ed.), 373), that the operation of

the rule in *Lawes* v. *Bennett* has been restricted by the decision of the Court of Appeal in *Woodall* v. *Clifton* (1905, 2 Ch. 257). At first sight it would seem to be a matter of some difficulty to say whether this suggestion is well founded or not, for there is a remarkable difference of opinion as to the point decided by the Court of Appeal in the latter case.

In *Woodall* v. *Clifton* two leases of land, each for ninety-nine years, were granted, one in 1867 and the other in 1869, each of which contained a proviso (operating as a covenant by the lessor on behalf of himself, his heirs and assigns) which purported to give the lessee or his assigns the option at any time during the term of purchasing the fee simple of the demised land at a certain price. In an action for specific performance, brought by an assignee of the lease against the owners of the reversion, who were assigns of the lessor, it was held by Warrington, J., that the option was void for remoteness. The Court of Appeal, according to the head-note, held, "that the proviso or covenant did not come within the statute 32 Hen. 8, ch. 34, so as to make the liability to perform it run with the reversion, and that consequently the action could not be maintained against the defendants. Semble, also, that the option was void on the ground of remoteness." That is to say, the action failed quite independently of the Rule against perpetuities. To the same effect is the opinion of a correspondent published in these columns shortly after the decision (49 Solicitor's Journal 544); he describes it as producing a "startling change in what was generally supposed to be the law." Warrington, J., seems also to have understood that the decision of the Court of Appeal did not turn on the question of remoteness, for in *Worthing Corporation* v. *Heather* (1906, 2 Ch. 532), which was an action brought on a similar option of purchase, the learned Judge said: "It is admitted that after the decision of the Court of Appeal in *London and South Western Railway Co.* v. *Gomm* and my own decision in *Woodall* v. *Clifton*, it would be impossible for this Court to hold that that contract could be specifically enforced." And in the new edition of White and Tudor's Leading Cases, the learned editors, after remarking that the decisions above referred to, "have greatly limited" the operation of the rule in *Lawes* v. *Bennett*, go on to say; "As the law now stands, an option of purchase given by a lessor to his lessee and his assigns is not a covenant running with the land

enforceable against an assignee of the reversion;" as an authority for which statement they cite *Woodall* v. *Clifton*, If by this we are to understand that an option of purchase, although restricted to the period allowed by the Rule against the perpetuities, is not specifically enforceable against an assign of the reversion, who takes with notice of it, the present writer ventures to submit that the statement is erroneous.

It is quite impossible to suppose that the Court of Appeal in *Woodall* v. *Clifton* intended to lay down any such doctrine, for the supposition involves the conclusion that Lords Justices Vaughan Williams, Romer and Stirling were ignorant of an elementary rule of equity. As those learned Judges themselves tell us (1905, 2 Ch. at p. 278), a valid contract giving an option of purchase is not the less a binding contract because it is contained in a lease; and it creates an equitable interest in the land (20 Ch. D. at p. 581.) Consequently, if a man for valuable consideration grants an option of purchase in respect of his land, limited as to the time of its exercise to the period allowed by the Rule against perpetuities, anyone who acquires the land from him with notice of the option takes subject to it, and when it is exercised, the Court can decree specific performance against him. The statute 32 Hen. VIII., ch. 34, or the Conveyancing Act, 1881, whichever is applicable to the case, does not affect the question one way or another. The reason why the Court of Appeal devoted their judgment to considering the operation of the Statute of Henry VIII. is that they thought it necessary to answer an ingenious argument addressed to them by the plaintiff's counsel. In *London and South Western Railway Co.* v. *Gomm* there was no privity of contract between the plaintiffs and the defendant, and the defendant could only be made liable on the ground that the option had created an equitable interest in the land which was binding on him; if *Woodall* v. *Clifton* had been a similar case the Rule against perpetuities would admittedly have been a complete answer. But in *Woodall* v. *Clifton*, said the plaintiff's counsel, the covenant giving the option was merely a personal contract, and therefore not within the Rule against perpetuities: it ran with the land by virtue of the statute and thus created privity of contract with the defendants, the assigns of the lessor, but it did not, they argued, create any equitable interest in the land until the option was exercised;

and then a contract of sale capable of immediate specific performance, and therefore free from objection on the ground of remoteness, came into existence. The Court of Appeal contented themselves with holding that the obligation of an option of purchase contained in a lease does not run with the reversion under the statute, for this was sufficient to dispose of the ingenious argument addressed to them. And the demolition of this argument, the object of which was to avoid the difficulty caused by the Rule against perpetuities, necessarily involved the conclusion that the option of purchase was void for remoteness. This is clear from the opening words of the judgment: "A contract in a lease giving an option of purchase might be good, without regard to the provisions of the statute of Henry VIII., as binding the land in the hands of the heirs or assigns, provided it did not infringe the law as to perpetuities. It would not be the less a binding contract because it was contained in a lease. But in the present case it is clear that the plaintiff cannot succeed on such a ground." Why not? Obviously because the contract did "infringe the law as to perpetuities."

In *Lawes* v. *Bennett* the period allowed for the exercise of the option was seven years, and the option was, therefore, free from objection on the score of remoteness; the defendant had notice of the option when he acquired the reversion, and it was, therefore, especially enforceable against him. The law in this respect has not been altered by the decision in *Woodall* v. *Clifton*, and *Lawes* v. *Bennett* remains a blot on the law relating to constructive conversion.

UNDERTAKINGS GIVEN BY SOLICITORS.

The judgment of Hamilton, J., last year in *United Mining and Finance Corporation* v. *Becher* (1910, 2 K. B. 206), contained an interesting discussion of the authorities on the jurisdiction of the Court to enforce in a summary manner undertakings given by solicitors, but we have delayed noticing it in consequence of the appeal, which was for some months pending. The result of the appeal, however (see 1911, 1 K. B. 840), leaves the judgment untouched.

Hanilton, J., held that the jurisdiction was not, as it had been argued, confined to the two cases—first, where the relation of solicitor and client exists and the undertaking is given to the client; and secondly, where a solicitor gives, in the course of a proceeding in Court, an undertaking to a person who is not his client; but it also extends generally to cases where a solicitor, acting in his professional capacity, gives an undertaking to a person who is not his client. A more restricted view of the jurisdiction was taken by Hart, V.-C., in *Peart* v. *Bushell* (2 Sim. 38), where he said that it did not come within his jurisdiction to order a solicitor for a vendor to perform an undertaking which he had given to the purchaser in connection with the sale, it not being an undertaking in a cause; and in *Re a Solicitor, Ex parte Hales* (1907, 2 K. B., p. 545), A. T. Lawrence, J., spoke of the jurisdiction as though it was confined to undertakings given in the course of legal proceedings: "The dishonourable conduct in such cases, in order to give the Court jurisdiction, must be dishonourable conduct to the applicant in the course of judicial proceedings, and if the applicant can shew that there has been dishonourable conduct to him, prejudicing his position, it is then that he can come to the Court and say, "I ask for the interposition of the Court by way of this summary remedy."

But in the present case Hamilton, J., declined to accept *Peart* v. *Bushell* (*supra*) as containing a correct statement of the law, and he pointed out that the dictum just quoted did not profess to have been uttered after exhaustive examination of the cases. It is, indeed, inaccurate not only in restricting the interposition of the Court to cases of undertakings given in the course of judicial proceedings, but in

requiring that the conduct of the solicitor shall have been dishonourable without any qualification of that term. In the present case it was admitted that there was nothing dishonourable in the conduct of the solicitor, nor were any legal proceedings pending. A contract had been entered into between Ivanitzky, a Russian subject, who was the owner of certain mining claims in Russia, with the United Mining and Finance Corporation with reference to the incorporation of a company to acquire the claims, and a sum of £1,000 was to be paid on the signing of the contract and £5,000 a week later. The £1,000 was paid, but the incorporation required first an additional week, and then further time, to pay the £5,000. The additional week was granted, but to obtain further time arrangements were made with the defendant, who was Ivanitzky's London solicitor, to go to St. Petersburg and endeavour to get his client's consent; and, to enable him to arrange further terms, first, one sum of £1,000, and then another sum of the like amount, was entrusted to him. In acknowledging the receipt of the former sum, he wrote: "I undertake to repay the sum of £1,000 to you at any time after the 8th November in the event of terms not having been arranged with Mr. Ivanitzky by that date, or in the event of the further agreement necessary to carry out any new terms not having been signed by that date." And a similar undertaking was given him with regard to the second sum. This was at the end of October and beginning of November, 1909. The solicitor went to St. Petersburg, but no terms were arranged within the time limited by the undertakings, and in December the corporation applied through their solicitors for the return of the £2,000. The solicitor for Ivanitzky replied that there was a question as to whether in the circumstances Ivanitzky was not entitled to the money, and he desired that the corporation should bring an action against him so that he could interplead and pay the money into Court. The corporation declined to adopt this course, and took out a summons for an order for repayment to them of the £2,000 in pursuance of the undertakings given when the money was handed over. There was, therefore, no question of dishonourable or discreditable conduct, and the point was whether the corporation were entitled to the benefit of the summary power of the Court with a view to preventing the solicitor from raising any question of a conflicting liability on his part to his Russian client.

Now, one effect of the summary procedure in the case of a solicitor is that the applicant gets speedily a remedy which he would otherwise have to seek in an action. In *Re Marchment* (1908, 1 K. B. 998), Vaughan Williams, L.J., referred to the procedure as "an action commenced in this convenient way by an originating summons;" but of course this is not the object of the procedure, otherwise it should be available for every creditor who desired a speedy remedy against his debtor. The foundation of the jurisdiction lies in the power of the Court to enforce its solicitors, as its officers, a high standard of duty. It is not as Hamilton, J., pointed out, referring to the decisions in *Re Hilliard* and *Re Gee* (2 D. & L. 919, 997), a question of dishonesty in the ordinary sense; and though in *Re Hilliard* the jurisdiction was expressed to be based upon the ground that it was exercised with the view of securing honesty in the conduct of the officers of the Court, yet honesty in that regard is not meant to be "purely a moral quality, but is, as is evident from the decision in *Re Gee* and other cases, a term applicable to the proper and professional observation of undertakings professionally given." And Hamilton, J., continued: "The conduct which is required of solicitors is to this extent, perhaps raised to a higher standard than the conduct required of ordinary men, in that it is subject to the special control which the Court exercises over officers, so that in certain cases they may be called upon summarily to perform their undertakings, even where the contention that they are not liable to perform them is entirely free from the taint of moral misconduct."

The view taken in *Re Gee* (*supra*) that the jurisdiction is based on the standard of conduct which is expected by the Court from its officers, suggests that the jurisdiction extends to all undertakings which are given by solicitors in their professional capacity, even though not given to a client, or in the course of judicial proceedings; and a clear decision to this effect was given by a Divisional Court (Lord Coleridge, C.J., and Mathew, J.) in *Re Pass* (35 W. R. 410). There a building society obtained judgment against a client of the solicitor, and were about to issue execution. They desisted on the representation of the solicitor that he was negotiating for an advance to the debtor sufficient to cover the judgment, and subsequently, when the judgment remained unsatisfied, the trustees of the society obtained a

guarantee from the solicitor for payment of the amount. This they sought to enforce by application to the Court for the exercise of its summary jurisdiction, and the Court ordered accordingly. "It is clear," said Lord Coleridge, C.J., "that (the solicitor) entered into the undertaking as a solicitor, and the trustees might not have accepted the guarantee had it not been entered into by him as such, for a special advantage is derived from a guarantee given by an officer of the Court, that it is enforceable by the creditor in a summary manner, without the trouble and expense of bringing an action against the guarantor."

In the present case Hamilton, J., observed that the language of the passage just quoted went further than any previous language in the direction of saying that the convenience of enforcing solicitors' undertakings summarily was one of the principal tests with regard to the exercise of the jurisdiction. But this is not the basis of the jurisdiction; otherwise, as already stated, the jurisdiction ought to be of general application. The jurisdiction is based on the ground that the Court expects a high standard of conduct in its officers; and when a personal undertaking has been given by a solicitor in his professional capacity, this standard is enforced by granting to the other party, whether client or no, and whether the undertaking has been given in the course of judicial proceedings or no, a summary remedy. The sole test is whether or no the undertaking has been given by the solicitor as such. In the course of complicated negotiations, said Hamilton, J., solicitors frequently have to give subsidiary undertakings for the payment of money and of a similar character, and those undertakings are given in their capacity as solicitors, "and money is entrusted to them under those undertakings largely because they are solicitors and are deemed, therefore, and found to be, especially worthy of trust." Of course, since the exercise by the Court of its jurisdiction is a matter of discretion, the circumstances may be such as to induce the Court not to make a summary order, though the learned Judge found no such circumstances in the present case. In spite of the solicitor's possible liability to his Russian client, he considered that the corporation were entitled to the summary procedure to enforce the undertakings, and an order was made accordingly, though in such a form as not to reflect in any way on the solicitor and so as to facilitate an appeal.

This appeal has lead to the interpleader proceedings which the solicitor asked for in the first instance, with the result that any claim to the money in question by Ivanitsky against the solicitor was held to be barred, and, subject to certain provisions as to costs, the money in Court was directed to be paid out to the corporation; but the Court of Appeal gave no decision upon the questions of law and practice which had been dealt with by Hamilton, J.

CANADIAN MINING LAW.

At the last meeting of the American Institute of Mining Engineers, held at Wilkesbarre, J. M. Clark, K.C., Toronto, who has been requested by the Dominion Government to prepare a federal mining law, read the following paper, by invitation of the Council, in order to obtain, if possible, useful suggestions from members of the Institute.

For some years past, those interested in the development of the increasingly important mining industry of Canada, have urged the adoption by the Dominion Parliament of a federal mining law, which would have the force and stability of statutory enactment. At present, placer-mining in the Yukon Territory, is governed by the Yukon Placer Mining Act. All other mining under federal jurisdiction is governed by orders in council and ministerial regulations.

In the earlier stages of development, it is perhaps a matter of necessity that these important matters should be so dealt with; but it is now felt that the time has come when mining-rights in the extensive regions under federal control should be put on a permanent basis, and that any changes required from time to time should be made only after full and open discussion in Parliament.

A short sketch will suffice to indicate how vast and varied the interests affected really are.

When the Dominion of Canada was constituted by the Imperial Statute known as the British North America Act of 1867 (which came into force by proclamation on July 1st of that year), it comprised only the present provinces of Ontario, Quebec, Nova Scotia, and New Brunswick; but provision was made for the inclusion of Newfoundland,

Prince Edward Island, British Columbia, Rupert's Land, and the North West Territories. Subsequently Rupert's Land and the North West Territories were acquired, the Crown colonies of British Columbia and Prince Edward Island were admitted, and all the other British territories and possessions in North America, with the islands adjacent thereto, except Newfoundland and its dependencies, were annexed to Canada by Great Britain.

Canada, consequently, now comprises the whole of the northern half of North America, except Alaska, Newfoundland, and that portion of Labrador which constitutes a dependency of Newfoundland. All lands, mines, minerals, and royalties belonging at the time of the union to the several provinces of Canada (now Ontario and Quebec), Nova Scotia, and New Brunswick, are declared to belong to that one of the said several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situated or have their legal origin—subject, however, to any trusts existing in respect thereof, or any interest therein, other than that of the province.

Each of the provinces named has jurisdiction to make laws for the management and sale of its public lands, and of the timber-wood thereon, and also as to property and civil rights in the province.

With some exceptions, not necessary to be here specified, the same rules were made applicable to Prince Edward Island and British Columbia. But very different conditions and regulations obtain in the remaining parts of Canada.

Under the sanction of an Imperial Statute, the Dominion of Canada obtained a surrender of the lands and territories granted by Charles II. in 1670 to the Governor and Company of Adventurers Trading into Hudson Bay, known as the Hudson Bay Co.; and Rupert's Land and the North West Territories were consequently admitted into the Dominion as of July, 15th, 1870.

When the provinces of Manitoba, Saskatchewan, and Alberta were formed, the lands, mines, and minerals, with slight exceptions, were not transferred to the provinces, but remained the property of the Dominion of Canada, and subject to federal jurisdiction and control.

The proposed federal mining-law must deal with the mines and minerals of these three provinces, of all the

territories (including the Yukon Territory), and of certain areas of the older provinces, principally the Indian lands and the railway belts of British Columbia. It must, therefore, deal with placer-mining, coal, natural gas, oil, petroleum, gold, silver, copper, and the other minerals. The whole field must be covered and every problem of mining law solved.

The framing of this general law is regarded by mining-men as supremely important, not only on account of the great interests actually and potentially involved, but also because it is looked upon as the first step towards the unification of the mining-laws of Canada. The vital importance of such completeness, wisdom, and practical convenience being presented by the federal statute as will recommend it to the several provinces for voluntary adoption is therefore self-evident.

While the Dominion has no jurisdiction over the mining-laws of the provinces which own mining-lands, it is hoped that the provisions of the federal law, by reason of their excellence and efficiency, will gradually be adopted by the various provinces.

To paraphrase a famous saying, this must take place, not by reason of Imperial power, but by the Imperial power of reason.

In this connection, a striking instance of concerted action by independent jurisdictions may be mentioned. Some years ago, an exceedingly well-drawn Act, dealing with bills of exchange and promissory notes, was passed by the Imperial Parliament. The same Act, with slight changes, was passed by the Canadian Parliament, and by a majority of the State legislatures of the United States; so that it may now be said that this statute governs the greater part of the English-speaking world!

There is no reason why the members of this institute should not take a useful and active part in obtaining for the mining world advantages similar to those which have been thus secured by the mercantile communities of Great Britain, the United States, and Canada.

At the present time, a discussion of the fundamental principles upon which such a mining-law as is proposed should be based, and of the merits and deficiencies of such codes as that of Mexico, would be interesting and instructive as bringing together, in useful form, the results of close

observation and varied experience of the mining-laws of the world.

There is no danger that any form of the so-called "apex-law" will be again introduced into Canada. That law was once copied, under the influence of miners from the Pacific States, by British Columbia, but was finally abolished April 23rd, 1892, since which date the rights of the holder of a mineral claim are confined, in British Columbia, as in all other parts of Canada, to the ground bounded by vertical planes drawn through its surface boundary-lines. The vested rights of claim-owners who had located their claims under former acts were protected; and the "apex-law," in British Columbia, as elsewhere, has given rise to costly litigation, which seems inherent in the system of extra-lateral rights.

There are, however, other important questions to be discussed: such as how adequately to protect the prospector, without at the same time introducing the danger of "blanketing;" the function of discovery in the acquisition of mining-title; the most useful forms of working-conditions, and the most efficient methods of enforcing such regulations. Last, but not least, the ever-present and ever-troublesome questions of taxation and royalties must be considered.

ROSSITER W. RAYMOND, New York, N.Y.:—It is satisfactory, but not surprising, to learn that there is no danger of the adoption in Canada of the apex-law with its extra-lateral right. I do not think that any community which has once experienced the evils of that system, and has escaped from them by abandoning it, would ever dream of returning to it. And British Columbia having had that experience, has doubtless furnished a sufficient object-lesson for the whole Dominion.

Mr. Clark's hope that a federal law may be framed which will ultimately be adopted by the provinces, is not chimerical. Not only the commercial instance which he cites, but the history of our United States law, encourages such a hope. That law prescribes a few conditions, leaving to local legislation freedom to ordain others, not inconsistent therewith. For instance, the form and the maximum dimensions of a mining-claim and the minimum amount of annual "assessment-work," are prescribed, together with a few forms of procedure; but smaller dimensions, larger amounts of annual work by possessory owners, and additional forms of procedure, may be imposed by local legisla-

tion or regulation. In many cases, especially during the earlier period following the adoption of the federal law (1870), this freedom was abundantly used, and locators of lodes or placers were often obliged to do, for the maintenance of their possessory titles, a good deal more than the U. S. statutes required; but gradually the convenience of uniform conditions, working quietly, but continuously, like the pressure of gravity, had its effect; and, at the present time, the local regulations of mining-districts have been largely superseded by State or Territorial statutes, which are, in the main, not only consistent, but identical with those of the federal law. Another illustration is the manner of making and recording a mining-location upon the public domain. It may seem strange that the U. S. law prescribes nothing at all in this respect. It required the location to have certain essential features of shape, maximum dimensions, and relations to the discovery of a mineral deposit within its boundaries; but it does not require any particular form of record or proof of these fundamental requirements. Indeed, the United States Government does not to-day possess either records or maps shewing what portions of its public mineral lands have been appropriated by valid mining-locations, and, being held under possessory title, do not now belong to that domain. The explanation of this anomaly is historical. At the time when our Government had to do something in order to define its relations with miners who were technical trespassers upon the public lands, those lands constituted, in the main, a vast unsurveyed wilderness. A theoretically perfect and properly guarded system for the record of mining-titles would have been impracticable of execution; and Congress, therefore, did the best it could under the circumstances. The punishment of trespassers being neither desirable nor practicable, it legalized the trespass, and left the parties concerned to settle their relations to one another according to the local rules which they had themselves adopted in the several mining-districts, or which might be established for them by local legislatures, subject to a few more or less elastic requirements established by the United States, as the real owner of the land. Meanwhile, the facts concerned were left to be proved by any kind of evidence, documentary or oral.

In my judgment, this action of Congress, though warranted under the circumstances so far as records of location, etc., were concerned, might and could have been remedied, when these circumstances had greatly changed, by requiring records of location, etc., to be made in or officially transmitted to the U. S. local or general land-office. But it is worthy of note that, without any such requirement, the effect of simple considerations of the certainty and safety of such records has brought about a general uniformity of local legislation, requiring them to be filed with the officers of Courts or counties, who will be responsible for their preservation from mutilation or destruction. It is not yet the duty of such officials to give notice to the United States of such entries, affecting the title of the United States to its public lands; but that step may easily be taken. Meanwhile, this narrative of somewhat chaotic progress may encourage the belief that obviously wise and useful features of administration will, in the end, be adopted by communities upon which, when first promulgated, they are not legally binding. In other words, it is worth while for a federal Government, like that of the U. S. or the Dominion of Canada, to frame a system of mining-law for its own lands, which will commend the acceptance of its constituent States or provinces in the administration of their own lands.

To this end, I think the first requisite is a survey of such lands. Apart from the mischievous extra-lateral right, the greatest cause of confusion and waste in those mining districts of this country which have been afflicted by our mineral land law, has been the lack of such public surveys as would permit the accurate definition of a mining location by reference to established landmarks. I do not know how far the Dominion has proceeded in the discharge of this public duty—one of the very first, in my opinion, which is incumbent upon any Government worthy of the name. At all events, I hope that Mr. Clark's draft of a code will include provision for immediate performance of this work. Mining grants may have to be made in territory not yet surveyed; but this should be done under conditions which will secure their subsequent re-definition by reference to the lines of such a survey, and will permit the readjustment of their boundaries so as to conform, if possible, to those lines. This will be comparatively easy, if the boundaries of the original location be required to follow the direction of the

future survey-lines—e.g., to run N-S. and E-W. The purchaser or possessory tenant of a tract of mining land would never object to paying for a little more area here, or a little less there, in order to conform to this obviously convenient rule—provided, of course, he were not haunted by the fear of losing problematical "apex-rights" by any variation in his lines. Under our present U. S. system, the locator determines, as well as he can, the course of the "apex," which he fondly hopes he has truly discovered, and is bound to claim a rectangle covering that course—under penalty of losing some or all rights, both extralateral and intralateral, if later developments should prove him mistaken. It might be a hardship to him to be required to draw his boundary lines in particular directions; although I am inclined to think that, in the long run and in the majority of cases, the result would be advantageous to our mining operators, by reason of their greater security of title. I have had to do with a large number of mining litigations, and I can recall few lode claims involved in such cases from which the lode did not depart, at some point, across a side line; so that I am inclined to believe that, even under the "apex-law," the boundaries of locations might have been required (with some modification or conditions as to length and width), to run N-S. and E-W., with real advantage to locator. Be this as it may, I see nothing to prevent the adoption by the Dominion of Canada of a provision so well-established and so universally approved in the sale of public agricultural lands.

Next in importance to public surveys is the official classification of the public lands to be leased, sold, or opened to prospectors. This classification should be, in my opinion, final and conclusive. If the land in question has been sold outright, say, at the price of agricultural land, and the grant or patent of the Government, conveying the full common-law fee simple to its contents, *usque ad astra, usque ad inferos*, has been issued to the purchaser, then the original official classification of it, as agricultural, should not be disturbed by proceedings attacking the purchaser's title. on the ground that it was or is, in fact, more valuable for mining than for agricultural purposes. The Government should occupy in this respect, precisely the position of a private seller. Of course, actual fraud, to which the purchaser was a party, might be pleaded against his title, but

to no further extent and under no other conditions by the Government than by any private party wronged by such fraud. That is to say, the Government should itself bring suit for the abrogation of its grant or deed; and the latter should not be open to collateral attack in any private suit. In short, the purchaser of anything from the Government is entitled, in justice as well as policy, to know just what he gets, and to be assured that he really gets it. The danger that through an incorrect official classification, mineral land may be sold at a lower price as agricultural land, is entirely insignificant compared with the importance of giving a clear and secure title to purchasers.

On the other hand, lands may be granted for agricultural purposes, with a reservation by the Government of the mineral rights. In this case, a previous official classification is less important. Yet I think it might well be required to protect the Government against unnecessary administrative complications. Any land which is officially classed as "mineral," had better not be sold as "agricultural;" and, in any case it is best that in such transactions, as in private bargains, both parties should clearly know what they are doing. In leases of mineral rights, it might be urged that the Government should be able to increase its requirements upon proof of unexpected value of the property. One obvious answer is, that such a change should be practicable, if at all, only after a term of years. But a more conclusive answer is, that the mining industry should be taxed upon its annual product or profits; and such a tax will take care of all unexpected prosperity, without disturbing the conditions of mining title. I feel bound to say, however, that nearly 50 years of observation and experience have inclined me to believe that the acquisition by private parties or corporations of the full fee simple of public lands, including the mineral right, is better in the long run, than any system of leasing by the Government. If such a system should be deemed advisable, then the condition of the retention of title should be, not a given amount of annual "work," but an annual payment of money. The requirement of "assessment work," under our U.S. law, is delusive and useless. The required annual payment of a sum of money would be much more effective in preventing the retention of possessory titles (which are practically, under our law, Government leases) for speculative purposes.

The policy of requiring continued work as a condition of continued possessory tenure is not particularly harmful with regard to metal mines, especially when, as with us, the amount of such work is trivial; but the Government leasing of coal lands for limited periods, and upon conditions of continual operation under penalty of forfeiture, is thoroughly bad. This idea has been suggested, I believe, by President Taft himself, whose sane and wise views of the general subject of "conservation" have won the approval of intelligent people. But I think he is wrong on this point. The operation of a colliery by a lessee is certain to cause the sacrifice of future to present interests; and the requirement that such a lessee shall keep going or lose his lease simply aggravates the situation. No Governmental inspector could fairly require of a lessee the expenditure of a large sum of money which he might never recover, under an arrangement subject at any time to executive cancellation, especially if such expenditure were required, not for the safety of workmen, but only for the advantage of some future lessee; and the requirements of continuous operation as a condition of tenancy, would operate to favour that over production which is the greatest enemy of "conservation." At a recent meeting of the institute, an eminent authority on this subject[1] read a paper advocating the shutting-down by the Government of coal mines that did not pay, in order to prevent the injurious over production and consequent waste of coal. My proposition is, that such mines will be shut down by their proprietors without Governmental interference, provided they are not forced to continue operations for some other reason, such as the danger of thereby losing their property altogether. In short, I think that, in all such questions, private ownership and liberty are likely to produce better results than Governmental supervision; and that the best thing any Government can do is to preserve order, enforce contracts, give to lessees or purchasers of its lands clear and valid titles, and then allow them the largest practicable liberty of enterprise and industry—reaping its own advantages, not from the extortion of a percentage of the anticipated results of speculative adventures, but from the consequent increased wealth of all its people and the fair taxation of that wealth.

[1] Edward W. Parker. The Conservation of Coal in the United States, *Trans.*, xl., 601 (1910).

I could say many other things upon the text which Mr. Clark has presented, but I trust the foregoing will incite other members of the institute to offer suggestions which may be useful in his undertaking.

IN THE PRIVY COUNCIL.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. (LORD MACNAGHTEN, LORD ROBSON and SIR ARTHUR WILSON.) [MARCH 28TH, 1911.

GRAND TRUNK RAILWAY CO. OF CANADA v. BARNETT.

Canada—Negligence—Injury to Trespasser.

The P.M. railway company, under an arrangement with the appellants, used the yard and station of the appellants at L. A P.M. train came into that station, discharged its passengers, and was proceeding backwards to its destination for the night when the respondent jumped on board, intending to ride a short distance towards his home. He stood upon the rear platform of a car and was in that position when a collision took place between the train he was on and a train of the appellants upon a "lead" of the appellants, by reason of the negligence of the appellants, whereby the respondent was injured, and in respect thereof he sued the appellants. In the action the jury found that at the time of the accident the respondent was not upon the P.M. company's train or the platform of the car by the company's permission.

Held, that the respondent was a trespasser, and that although the appellants were under a duty to the respondents not wilfully to injure him, they were not liable to him for mere negligence, and that as the accident was due to the negligence of the appellants' servants and not to any wilful act the respondent was not entitled to recover.

* 27 T. L. R. 359.

This was an appeal from a judgment of the Court of Appeal for Ontario (Mr. Justice Meredith dissenting) of October 19th, 1910, affirming a decision of a Divisional Court of the High Court of Justice, which reversed a judgment of Chief Justice Meredith delivered in favour of the appellant company on the findings of the jury.

Mr. D. L. McCarthy, K.C. (of the Canadian Bar), and *Mr. J. F. Spence*, appeared for the appellant company; *Mr. E. F. Faulds* and *Mr. P. H. Bartlett* (both of the Canadian Bar), for the respondent.

LORD ROBSON, in delivering their Lordships' judgment, said the respondent was plaintiff in the action, and sued for damages for personal injuries caused by the negligence of the defendant railway company's servants.

The Grand Trunk Railway Company and the Pere Marquette Railway Company have each a station and railway yards a short distance from each other in the city of London, Canada.

The Grand Trunk Railway, under some arrangement with the Pere Marquette Railway, which was not given in evidence, allow the latter company's trains, or some of them, access to the Grand Trunk Company's station by means of a cross line called a "lead." This line begins on the Pere Marquette Company's property, and, entering the railway yard of the Grand Trunk Company, crosses its line so as to bring the Pere Marquette train up to the Grand Trunk station. The particular train concerned in the accident was the Pere Marquette train, which arrived at the Pere Marquette station at about 9.25 on the night of August 23rd, 1909. It was signalled from the Grand Trunk Company's yard to come along the "lead," which it did, and duly discharged its passengers at the platform of the Grand Trunk station. Its ordinary and proper course then was to wait until it received a signal from the Grand Trunk switch operator, after which it backed out over the Grand Trunk tracks and returned to the Pere Marquette yard, where it remained for the night. The respondent Barnett was aware of this practice. On the night in question he came into the Grand Trunk station, and, going to the Pere Marquette train before it began to back out, he jumped on the platform at the rear end of a car, and stood with one foot

on the platform and one foot on the step, his object being to get a lift as far as the Pere Marquette station, which was on his way home. He was aware that the train was not at that moment in use as a passenger train, and he of course had no ticket and does not pretend that he received any invitation or had any right to do what he did.

He must have also been aware that in thus standing on the platform, and particularly in a position so precarious as having one foot on the platform step, he was disobeying a by-law of the Grand Trunk Railway Company. His knowledge on that point, however, is immaterial, for the by-law has the force of a statute. His counsel contended that it bound only the passengers of the Grand Trunk Railway Company, but it is applicable to any person taking any train on their premises; a similar prohibition existed on the Pere Marquette Railway, and is even said to have been affixed to the door of the car by which the respondent was travelling on this occasion. His breach of duty in thus standing on the car platform seems, in the events that happened, to justify a charge of contributory negligence against him, but the view their Lordships take of the rest of the case makes it unnecessary to decide this point.

The train backed as usual along the "lead," and while still on the property of the Grand Trunk Company a freight train of that company, which was being made up at an adjacent siding, was negligently backed so as to come into collision with the train on which the respondent was standing. He was thereby thrown off the car platform and seriously injured. In their Lordships' opinion, the respondent was a trespasser both on the premises of the Grand Trunk Company, and on the train of the Pere Marquette Company. At the trial the respondent contended that he, in common with other persons and with the knowledge of the Pere Marquette officials, had frequently made use of this train when backing from the Grand Trunk station to the Pere Marquette Company's yards, and had not been turned off the train or called upon to pay a fare. He gave evidence on this point which, if it had been believed by the jury, would have sufficed to shew that on the occasion in question he was there with the knowledge, at all events, of the brakesman of the train. The brakesman and the other Pere Marquette servants in charge of the train were called, and stated that they did not allow passengers to use it on the

way back to the Pere Marquette yards, and did not acquiesce in such user. Their evidence was that if they saw such persons in time they put them off, but they could not stop the train to put them off, and still less could they put them off while the train was moving, so that no doubt a certain number of persons on some occasions managed to use the train in this irregular way. The evidence on both sides as to this user of the empty train by persons without tickets, and the alleged acquiescence therein on the part of the Pere Marquette Railway officials, was fully and carefully put before the jury by the learned trial Judge, and he directed them that if in their opinion there was a general practice of persons going, as the plaintiff had gone, on the platform of this train with the knowledge, not merely of one set of officials or railway servants connected with the train, but of different officials and on different occasions, then that was evidence upon which they might come to the conclusion that it was a practice sanctioned by the company itself.

The following were the questions submitted to the jury by his Lordship, so far as they are now material: —

(1) Was the plaintiff, at the time of the accident, upon the train of the Pere Marquette Railway Company by permission of the company? Answer.—No.

(2) Was the plaintiff upon the platform by the permission of the Pere Marquette Railway Company? Answer.—No.

Before putting these questions his Lordship invited counsel for the plaintiff to suggest any other question which they thought should be put to the jury, but the only suggestion in answer to that invitation was that the jury should be asked to say whether or not the negligence was gross, and in view of the admissions of the parties the learned Judge very properly declined to put that question. It was further agreed by the parties that if there was any point necessary for the determination of the rights of the parties not covered by the questions submitted, that point should be determined by the Courts.

The counsel for the respondent now complain that the jury were not asked whether the respondent was on the car on the occasion in question with the knowledge and acquiescence of the brakesman of the train. It was not suggested that the brakesman had authority to give permission,

and, so far as standing on the car platform was concerned, the respondent must have known from the prohibitory notice on the car door that the brakesman had no authority to allow that. The brakesman, however, swore that he did not know the respondent was there; and even had he known it, the circumstance would only have been material as evidence of the general practice alleged by the respondent. In the absence of any such practice, a specific finding that the brakesman had, on this occasion, allowed the respondent to get on the train without a ticket, and then to stand on the platform of the car, could not have given the respondent a cause of action. The learned Judge adopted the course of directing the jury as to the facts necessary to establish a cause of action, and then putting a question which covered those facts. He was neither invited nor bound to put further questions on any particular fact.

There was a further question raised on appeal, though not in dispute at the trial, as to whether the collision took place on the property of the Grand Trunk Railway Company, or on that of the Pere Marquette Railway Company. The respondent's counsel now contend that it took place on the property of the latter company, so that their client could not be said to be a trespasser on the property of the appellants. The evidence is quite clear that at the trial the collision was treated by everybody as having taken place on the ground or in the yards of the Grand Trunk Company. The junction between the two properties was stated by the respondent himself as being in or near Colborne street, and that is some distance further along in the direction in which the train was backing, and beyond the point at which the collision took place. The respondent himself said the train "travels along the Grand Trunk track to Colborne street, and then they throw a switch for it to get on to the Pere Marquette," and the other witnesses refer to the Pere Marquette yard as beginning at Colborne street.

The Court of Appeal said that, as the Pere Marquette Railway Company was entitled, under its arrangement with the Grand Trunk Company, to use the "lead" as a means of access to the Grand Trunk station and back again to the company's yard, it would, while actually using that "lead," be necessarily in "exclusive possession" thereof even as against the Grand Trunk Railway Company. From this it is inferred that the respondent was no trespasser *quoad* the

latter company. There is no evidence that the Pere Marquette Railway Company have any right of property in the "lead." So far as can be judged from the facts before the Court, the Pere Marquette Company would seem only to have a right of way for themselves and persons lawfully claiming under them, but, subject to that right, the property remains in the Grand Trunk Company. Under those circumstances the respondent was not the less a trespasser on their property because he was there in the car of another company who might possibly have been able to give him leave or license to be there, but had not, in fact, done so. The notion that the Pere Marquette Company while using its right-of-way was in "exclusive possession" of the way, and therefore was alone entitled at that time to maintain an action for trespass, does not seem to distinguish adequately between the rights of a tenant and those of a licensee.

The case must therefore be taken on the footing that the respondent was a trespasser, and the question is, what under those circumstances are his rights against the appellant company? In order to make good a case of actionable negligence against them he must shew some breach of duty on their part towards himself. The Divisional Court have held that "the personal safety of a human being (though he be a trespasser) must not be endangered by the negligent act of another. Given the circumstances of this case, it does not seem that the defendants are exempt from liability though the plaintiff was nothing else than a mere trespasser." The Court of Appeal was not prepared to agree with this general statement of the law, but rested its judgment on the ground above mentioned, viz., that the Grand Trunk Railway Company had parted with its right of possession, and therefore could not have maintained an action of trespass against the respondent. The railway company was undoubtedly under a duty to the plaintiff not wilfully to injure him: they were not entitled, unnecessarily and knowingly, to increase the normal risk by deliberately placing unexpected dangers in his way, but to say that they were liable to a trespasser for the negligence of their servants is to place them under a duty to him of the same character as that which they undertake to those whom they carry for reward. The authorities do not justify the imposition of any such obligation in such circumstances, a car-

rier cannot protect himself against the consequences which may follow on the breach of such an obligation (as, for instance, by a charge to cover insurance against the risk), for there can be no contract with trespassers; nor can he prevent the supposed obligation from arising by keeping the trespasser off his premises, for a trespasser seeks no leave and gives no notice.

The general rule, therefore, is that a man trespasses at his own risk. This is shewn by a long line of authorities, of which the *Great Northern Railway* v. *Harrison* (10 Ex. 376), *Lygo* v. *Newbold* (9 Ex. 302), and *Murley* v. *Grove* (46 J. P. 360), are familiar examples. There is sometimes difficulty, however, in deciding when a man is really a trespasser. That is a question of fact, and in the present case it has been decided against the plaintiff by a jury properly directed. Again, even if he be a trespasser, a question may arise as to whether or not the injury was due to some wilful act of the owner of the land involving something worse than the absence of reasonable care. An instance of this occurred where an owner placed a horse he knew to be savage, in a field which he knew to be used by persons as a short cut on their way to a railway station (*Lowery* v. *Walker,* 26 The Times L. R. 108; 27 The Times L. R. 83; [1910] 1 K. B. 173; [1911] A. C. 10.) In cases of that character there is a wilful or reckless disregard of ordinary humanity rather than mere absence of reasonable care.

When these qualifications are borne in mind, the cases pressed by the respondent on the Courts below present little difficulty. Thus, in *Harris* v. *Perry* (19 The Times L. R. 537; [1903] 2 K. B. 219), the plaintiff was on the train in response to an invitation by a superintendent, who represented the defendant, and under those circumstances a previous verbal prohibition by the defendant was held not sufficient to justify the plaintiff in being treated as a trespasser. In *Lowery* v. *Walker,* the Court of Appeal (Vaughan Williams and Kennedy, L.JJ.), held that the plaintiff being a trespasser could not recover, and though their judgment was reversed in the House of Lords it was only on the ground that on a proper construction of the findings of the County Court Judge the plaintiff ought not to be treated as a trespasser. Otherwise, as Lord Halsbury says, the "word 'trespasser' would have carried the learned counsel for the defendant all the way he wants to get."

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be allowed, and that the judgments of the Court of Appeal for Ontario and of the Divisional Court ought to be reversed and the judgment of the Trial Judge restored. At the trial the appellants do not appear to have asked for costs, but they have been ordered to pay the costs of the two appeals in the Courts below. These costs must be repaid to them by the respondent, and they will also have their costs of this appeal.

Solicitors—*Batten, Proffitt,* and *Scott; Poole* and *Robinson.*

IN THE SUPREME COURT OF CANADA.

GOODISON THRESHER CO. v. McNAB.

ONT.] [DECEMBER 23RD, 1910.

Statute—Construction—Ontario Municipal Act—Bridges—Crossing by Engines — Condition Precedent — R. S. O. (1897), ch. 242—3 Edw. VII. ch. 7, sec. 43—4 Edw. VII. ch. 10, sec. 60.

R. S. O. (1897), ch. 242, as amended by 3 Edw. VII., ch. 7, sec. 43, and 4 Edw. VII. ch. 10, sec. 60, provides as follows:—

"10. (1) Before it shall be lawful to run such engines over any highway whereon no tolls are levied, it shall be the duty of the person or persons proposing to run the same to strengthen, at his or their own expense, all bridges and culverts to be crossed by such engines, and to keep the same in repair so long as the highway is so used.

"(2) The costs of such repairs shall be borne by the owners of different engines in proportion to the number of engines run over such bridges or culverts. R. S. O. 1887, ch. 200, sec. 10.

"(3) The two preceding sub-sections shall not apply to engines used for threshing purposes or for machinery in construction of roadways of less than eight tons in weight. Provided, however, that before crossing any such bridge or culvert it shall be the duty of the person or persons proposing to run any engine or machinery mentioned in any of the

subsections of this section to lay down on such bridge or culvert planks of such sufficient width and thickness as may be necessary to fully protect the flooring or surface of such bridge or culvert from any injury that might otherwise result thereto from the contact of the wheels of such engine or machinery; and in default thereof the person in charge and his employer, if any, shall be liable to the municipality for all damage resulting to the flooring or surface of such bridge or culvert as aforesaid, 3 Ed. VII., ch. 7, sec. 43, 4 Ed. VII., ch. 10, sec. 60."

Held, affirming the judgment of the Court of Appeal (19 Ont. L. R. 188), Fitzpatrick, C.J., and Girouard, J., dissenting, that the strengthening of a bridge or laying of planks over it is a condition precedent to the right to run an engine over the same; and any engine crossing without observing such condition is unlawfully on the bridge and liable for injury resulting therefrom.

Held also, Fitzpatrick, C.J., and Girouard, J., dissenting that planks required by sub-sec. 3 over a bridge or culvert were not intended merely to protect the surface from injury by reason of inequalities in the wheels of the engine or machinery passing over it, but was also to guard against the danger of the flooring giving way.

Appeal dismissed with costs.

Robinette, K.C., and *J. M. Godfrey,* for appellant.

Wm. White, K.C., and *Douglas,* K.C., for respondent.

(Owing to illness of a Judge this case could not be reported earlier.)

GARLAND v. O'REILLY.

ONT.] [FEBRUARY 21ST, 1911.

Donatio Inter Vivos—Ante-nuptial Contract—Gift to Wife —Payment at Death of Husband—Institution Contractuelle—Onerous Gift.

An ante-nuptial contract provided that "in the future view of the said intended marriage he, the said Edward O'Reilly, for and in consideration of the love and affection

and esteem which he hath for and beareth to the said Miss Eliza Petrie, hath given, granted and confirmed, and by these presents doth give, grant and confirm unto the said Miss Eliza Petrie, accepting thereof . . . . the sum of twenty-five thousand dollars, currency of Canada, payable unto the said Miss Eliza Petrie by the heirs, executors, administrators or assigns of him the said Edward O'Reilly, the payment whereof shall become due and demandable after the death of him, the said Edward O'Reilly." The parties were married, and on the death of the said O'Reilly his wife claimed the right to rank on his estate as a creditor for the said sum of $25,000 which claim was contested by the general body of creditors who had all become such after said contract was made.

Held, affirming the judgment of the Court of Appeal (21 Ont. L. R. 201), that this clause in the contract must be construed as a *donatio inter vivos* creating a present debt in favour of the future wife payment of which was deferred; that such a contract could not be attacked by subsequent creditors; and that the wife was entitled to rank on the estate for the amount of said gift.

Held per Girouard, J., that the donation was one "*a titre onereux.*"

Appeal dismissed with costs.

Casgrain, K.C., for appellants.

Lafleur, K.C., and *Chrysler*, K.C., for respondents.

HALIFAX BOARD OF TRADE v. GRAND TRUNK RLY. CO.

RY. BD.] [MARCH 24TH, 1911.

Appeal—Leave by Judge—Jurisdiction of Railway Board—Doubt as to Decision of Board.

A Judge of the Supreme Court of Canada will not grant leave to appeal from the decision of the Board of Railway Commissioners on a question of jurisdiction if he has no doubt that such decision was correct.

Leave refused.

Code, K.C., for motion.

Biggar, K.C., contra.

REDDY v. STROPPLE.

N.S.] [APRIL 3RD, 1911.

Deed of Land—Description—Ambiguity—Admissions.

In an action for trespass to land both parties claimed title from the same person and the dispute was as to which title included the locus. The deed under which S. claimed contained the following as part of the description: "then running in an eastwardly direction along the said highway until it comes to a crossway in the public highway and running in a southerly direction until it comes to the waters of Broad cove." There were two crossways in the highway, and S. contended that the first one reached on the course was indicated, and R. that it was the second lying a little farther south.

Held, reversing the judgment of the Supreme Court of Nova Scotia (44 N. S. Rep. 332) Idington and Duff, JJ., dissenting, that to run the course to the first crossway would take it over land not owned by the grantor; that there were other difficulties in the way of taking that course; that S. had apparently for many years treated the second crossway as the boundary; and what evidence there was favoured that view; the construction should be that the crossway mentioned in the description was the second of the two.

Appeal allowed with costs.

Newcombe, K.C., for appellant.

Gregory, K.C., for respondent.

TORONTO RAILWAY CO. v. TOMS.

ONT.] [APRIL 3RD, 1911.

Damages—Negligence—Physical Injuries—Mental Shock—Severance of Damages.

T. was riding in a street railway car when it collided with a train. He was thrown over to the back of the seat facing

him, but was able to leave the car, and start to walk to his place of business, but had only proceeded a short distance when he collapsed and had to be taken home in a cab. He was laid up for several weeks, and on the trial of an action against the railway company for damages one doctor giving evidence testified that the physical injury he had received was the exciting cause of his condition, while others ascribed it to mental shock. Negligence on the part of the company was not denied, but the trial Judge was asked to direct the jury to separate the damages for the two, but refused. A verdict for T. was upheld by the Court of Appeal.

Held, affirming the judgment appealed against (22 Ont. L. R. 204), that the trial Judge rightly refused to direct the jury as asked; that the evidence shewed the injuries to T. were the direct consequence of the negligence of the company, and that the verdict should stand.

Appeal dismissed with costs.

Glyn Osler, for appellants.

Masten, K.C., for respondent.

RORISON v. BUTLER BROS.

ONT.] [APRIL 3RD, 1911.

Negligence—Damages—New Trial—Volens.

In the construction of a tunnel under the Detroit River the respondent company had an apparatus for lifting material to the surface consisting of a crane and cable with hook and buckets hauled up and down through an air shaft by an engine on the surface. At the top of the shaft a "tag man" was stationed to signal the engineer when to start or stop the engine, and when to run fast or slow. The officers and men of the respondent company and of the Detroit River Tunnel Company engaged on the same work were in the habit of coming to the surface through the air shaft, and the "tag man" gave a special signal to the engineer when a man was coming up. R., an employee of the Detroit River Company was attempting to come up on one occasion when the apparatus did not remain in the centre, but was swinging around,

and in a narrow part of the shaft a block on the cable with a hook over which was a ring which R. was grasping, caught in the timbers on the side and the ring came off the hook, throwing him to the bottom of the shaft and causing his death. In an action on behalf of his parents the jury found the respondent company negligent in using an unsafe hook while allowing persons to use this apparatus, and also by the tag man not signalling the engineer to stop until the cable ceased moving. They assessed the damages at $4,000 all for deceased's mother. The verdict was sustained by a Divisional Court, but the Court of Appeal granted a new trial on the ground that the questions of *volens* on the part of R. should be passed upon by the jury.

Held, that as such question had been raised for the first time in the Court of Appeal a new trial should not have been granted on that ground.

The evidence as to damages was that deceased gave his mother $25 per month regularly and presents in goods or money that would make his whole contribution over $500 a year.

Held, that $4,000 was an excessive sum to give the mother, and the order for a new trial should stand, but be restricted to a proper assessment of the damages.

Order accordingly.

Sale, for the appellant.

Rodd and *Kenning,* for respondents.

CLARKE v. GOODALL.

ONT.] [APRIL 3RD, 1911.

Appeal—Nature of Action — Action in Equity — Judicial Proceedings — Declaration of Rights — Injunction — Reference—Appeal from Referee—Final Judgment.

An action was brought claiming a declaration that plaintiff was entitled to receive a certain number of shares of the capital stock of a company and for an injunction to restrain defendant from dealing with his shares until those claimed

by plaintiff were transferred to him. On the trial it was held that plaintiff was entitled to damages for breach of contract to deliver him the shares, and a reference was ordered to have such damages assessed, further directions and costs being reserved. On appeal to a Judge from the Referee's report, the damages were reduced, but were increased on further appeal to a Divisional Court, whose judgment was affirmed by the Court of Appeal. On appeal from the judgment of the registrar of the Supreme Court affirming the jurisdiction to entertain an appeal from the Court of Appeal.

Held, that the action was one at common law for breach of contract, and that neither the inclusion of the demand for an injunction nor the reservation by the trial Judge of further directions, made it a judicial proceeding in the nature of a suit or proceeding in equity within the meaning of sec. 38 (c) of the Supreme Court Act so as to permit of an appeal to the Supreme Court whether the judgment appealed against was final or interlocutory.

Held, also, that the judgment of the Court of Appeal, varying the assessment of damages by the Referee was not a final judgment from which an appeal would lie to the Supreme Court.

Appeal from Registrar allowed with costs.

Owen Ritchie, for appellant.

G. F. Henderson, K.C., for respondent.

REX v. WALLBERG.

Ex. C.] [APRIL 3RD, 1911.

Contract—Public Work — Work Dehors Contract — Acceptance by Crown—Payment—Fair Value.

W. was contractor with the Crown for constructing a car and locomotive repair plant at Moncton, N.B., and was subject to the orders of the Government engineer. By order of the engineer and with no contract in writing therefor, he constructed sewers and a water system in connection with said works, and on completion of his contract the Crown accepted the additional work and agreed to pay its fair value,

but not the amount claimed, which was deemed excessive. The Department of Railways referred the claim to the Exchequer Court and, by consent, it was referred to the Registrar of the Court to have the damages assessed, the order of reference providing that "the amount to be ascertained shall be the fair value or price thereof allowed on a *quantum meruit.*" The Registrar fixed the amount at $53,205, as the fair value of the work reasonably executed on a somewhat different plan. The Judge of the Exchequer Court added $39,000 to this amount, holding that the Crown had admitted the authority of the engineer to order the work to be done, and that W. was entitled to the actual cost plus a percentage for profit. On appeal by the Crown:

Held, ANGLIN, J., dissenting, that the judgment appealed against was not warranted; that the Crown had not admitted the authority of the engineer, but expressly denied it by pleadings and otherwise; that all W. was entitled to be paid was the fair value of the work to the Crown, and the amount allowed by the Referee substantially represented such value.

Appeal allowed with costs.

Tilley and *Friel,* for appellant.

Nesbitt, K.C., and *Harold Fisher,* for respondent.

ALLEN v. THE KING.

B.C.] [MARCH 31ST, 1911.

Criminal Law — Conviction for Murder—Trial — Evidence Improperly Admitted—Substantial Wrong to Prisoner—New Trial—Criminal Code, sec. 1019.

Section 1019 of the Criminal Code provides that a convicted prisoner shall not be granted a new trial for improper admission of evidence or some illegal proceeding at the trial unless the Court of Appeal is of opinion that "some substantial wrong or miscarriage was thereby occasioned."

Held, DAVIES and IDINGTON, JJ., dissenting, that in order to obtain a new trial under this provision the prisoner is not required to demonstrate that substantial wrong or mis-

carriage was in fact occasioned by the evidence improperly admitted or the illegal procedure; it is sufficient if it appears that such wrong or miscarriage might have been occasioned.

Held, per DAVIES and IDINGTON, JJ., that if evidence was improperly admitted at the trial in this case, which is doubtful, it could not under the circumstances, have affected the verdict.

New trial ordered.

J. A. Ritchie, for appellant.

McKay, K.C., for respondent.

RECENT ENGLISH DECISIONS.

If a workman dies from angina pectoris, his representatives can only claim under the Workmen's Compensation Act, 1906, said the Court of Appeal, if there is direct evidence or a legitimate inference from the facts that death arose out of as well as in the course of employment. *Hawkins* v. *Powell* (1911), W. N. 53.

Under a covenant well and substantially to repair demised premises and to keep them in thorough repair and good condition, a lessee is bound to bear the expenses of rebuilding an external wall condemned as a dangerous structure, according to the Court of Appeal, even though the unsafe condition of the wall is caused by old age and lapse of time. The Master of the Rolls said that repair frequently involved renewal, but that did not relieve the tenant from liability unless the renewal or rebuilding was such as essentially to change the character of the demised premises so that the landlord was getting an entirely new subject matter. *Torrens* v. *Walker* (1906), 2 Ch. 166, and *Lister* v. *Lane & Nesham* (1893), 2 Q. B. 212, were cases of that kind. Here the rebuilding was only of a subsidiary portion of the demised premises, and therefore the defendants, on the principle of *Proudfoot* v. *Hart* (1890), 25 Q. B. D. 42, were liable under the covenants in this lease to repair this wall in the only way in which it could be repaired. *Lurcott* v. *Wakeley* (1911), W. N. 46.

The Court of Appeal holds that a member of a trade union can bring an action to obtain rescission of a resolution of expulsion and for restoration to membership. The usual rules of a trade union do not constitute an illegal contract in restraint of trade, and such an action is not a legal proceeding "instituted with the object of directly enforcing or recovering damages for the breach of an agreement for the application of the funds of the trade union" within sec. 4 of the Trades Union Act, 1871. *Osborne* v. *Amalgamated Society* (1911), W. N. 59.

Ignorance of the existence of the Workmen's Compensation Act, 1906, is not a "mistake or other reasonable cause" within the meaning of clause (b) of sec. 2 of the Act for not making a claim within the six months limited by the Act. So held by the Court of Appeal. *Roles* v. *Pascall,* 130 L. T. 439.

Does a solicitor, by entering an appearance, warrant the authority which he thereby claims to represent his client? Yes, says the Court of Appeal. If he enters an appearance for a non-existing company he will be personally liable to the plaintiff for the costs of the action. *Simmons* v. *Liberal Opinion, Limited* (1911), W. N. 52.

Sec. 30, sub-sec. 2, of the Bills of Exchange Act, 1882, does not apply when an action is brought by the person to whom the bill was originally delivered, and in whose hands it remains. The Court of Appeal holds that the burden of proof in such a case is on the defendant, who must establish the fraud or duress of which he complains. *Talbot* v. *Van Boris,* 27 T. 266.

What does the word "month" mean in the Solicitors Act, 1843, sec. 37? The question arose before a Divisional Court in connection with a solicitor's right to sue on his bill—the bill having been sent by post. The Court held that "month" meant "clear calendar month," and that "sent by post" in sec. 37 meant sent by post in such a way that it should in the ordinary course of post be delivered one month before action. The clear calendar month, said the Court, must be reckoned exclusively of the day on which the bill should be delivered in the ordinary course of post, and exclusively of

the day on which the action is brought. *Browne* v. *Black* (1911), W. N. 68.

A voluntary settlement can be declared void under 13 Eliz. ch. 5, without proof of actual intention to defeat or delay creditors, if the circumstances be such that the settlement must necessarily have that effect. So held by Warrington, J., following *Freeman* v. *Pope,* L. R. 5 Ch. 538, and distinguishing *Re Mercer,* 17 Q. B. D. 290, and *Re Holland* (1902), 2 Ch. 360. He also held that if it is declared void at the instance of the settlor's trustee in bankruptcy, the whole of the settled property must be handed over, without prejudice to the right of the trustee of the settlement to recover the balance, if there be any, after all charges have been paid. *Carruthers* v. *Peake,* 55 S. J. 291.

Is it contrary to public policy for a testator to give property to a married woman who is separated from her husband, with a gift over if she lives with him again? No, said Joyce, J. In *In re Moore* (1888), 39 Ch. D. 116, the Court thought that the object of the bequest was to induce the wife to live apart from her husband, but in the present case the wife was deserted by her husband, and the will provided for her maintenance till he should come back. *Charleton, In re, Bracey* v. *Sherwin* (1911), W. N. 54.

Swinfen Eady, J., holds that a solicitor has a lien on a debenture trust deed for the cost of investigating title and preparing the trust deed if retained to do so by the proposed trustees of the deed. The lien prevails against subsquent trustees and the debenture holders. His Lordship distinguished *In re Snell* (1877), 6 Ch. D. 105, on the ground that there the solicitors were acting for both mortgagor and mortgagee. *Dee Estates, Limited, In re, Wright* v. *Dee Estates, Limited* (1911), W. N. 61.

Are the words "arrears of rent" wide enough to include rent accruing but not yet payable? Yes, said Swinfen Eady, J. And therefore where a testatrix who was tenant for life gave to the remainderman all arrears of rent in respect of the settled estates which should at her death be due to her, it was held that he was entitled, on the true construction of the will, to an apportioned part of the rent up to the death. *Ford, In re, Myers* v. *Molesworth* (1911), W. N. 66.

If an auditor is appointed to investigate the condition of a business he is bound to make a reasonable and proper investigation of the accounts and stock sheets, and if, said Lord Alverstone, C.J., as a reasonably prudent man, he ought to conclude that all is not right with the accounts, he has a duty to call attention to the matter; he may rely on documents vouched by servants of the business if he reasonably believes such servants to be honest. *Henry Squire Cash Chemist Co., Limited,* v. *Ball, Baker & Co.,* 27 T. 269.

Joyce, J., holds that the Court, in sanctioning the reduction of a company's capital, will not dispense with the words "and reduced" merely because the company carries on business mostly abroad, where the words might be misunderstood. *Lindner & Co., In re* (1911), W. N. 66.

Warrington, J, holds that if a patentee issues a writ for infringement after he has applied to amend his specification he is entitled to rely on the amended specification if leave to amend is granted after the issue of the writ. The learned Judge explains an observation of Lindley, L.J., in *Andrew & Co.* v. *Crossley Bros.,* 9 Rep. Pat. Cas. at p. 172. *Stepney Spare Motor Wheel Co., Limited* v. *Hall* (1911), W. N. 56.

If a judgment debt is made payable at a future date, can the plaintiff issue a garnishee summons before the date of payment? Yes, said a Divisional Court, the judgment was "still unsatisfied" at the date the summons was issued. On the hearing the summons might be dismissed, and costs awarded, if the garnishee proceedings were vexatious. (See County Court Rules, Ord. XXVI. r. 1.) *White* v. *Stennings* (1911), W. N. 68.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

RULES PASSED 4TH MARCH, 1911.

1308. Rule 42 is hereby amended by striking out paragraph 11 and substituting therefor the following:—

11. Application respecting the guardianship of the person of infants and for the sale, lease or mortgage of the property of infants.

1309. Rule 960 is hereby repealed and the following substituted therefor:—

960. All applications for the sale, mortgage or lease of an infant's estate shall be made to a Judge in Chambers.

1310. Rule 965 is amended by striking out the words "or the Master in Chambers or other Officer" in the first and second lines.

1311. Rule 966 (1) is amended by striking out the words "Master in Chambers or other Officer."

Rule 966 (2) is amended by striking out the words "or Officer."

1312. Rule 968 is amended by striking out the words "or Officer."

1313. All judgments and orders directing payment of costs shall direct payment to the party entitled to receive the same and not to his Solicitor.

1314. When costs are directed to be paid out of money in Court the Solicitor of the party entitled to receive the same shall be entitled to have the cheque drawn in his favour upon filing with the Accountant an affidavit stating: (*a*) That he is the party entitled to receive such costs, and (*b*) That he has not been paid his costs or any part thereof, and that the costs, payment of which is sought, are justly due to him. If the Solicitor has been changed in the course

of the litigation this fact shall be shewn in the affidavit, and the consent of both Solicitors shall be filed.

1315. When money to which an infant is entitled is paid into a County Court, the Clerk of the said County Court shall forthwith cause the same to be transmitted to the Accountant with a statement shewing when the money was so paid in, and a copy (certified by the said Clerk) of all judgments or orders affecting the same, and the said money shall thereupon be placed to the credit of the said infant and shall be paid out to him with accrued interest on his attaining his majority without further order, unless in the meantime a Judge of the High Court shall otherwise order.

1316. When money is paid into Court under the order of a Surrogate Judge to the credit of an infant it shall be paid out of Court to him with accrued interest without further order upon his attaining his majority.

1317. Rule 695 is amended by adding the following:—

(3) When money is paid to the joint credit of the Accountant and the party entitled, the Accountant shall sign the cheque for payment out upon the production of the consent of the party paying in, duly verified, or of his Solicitor, or in the absence of such consent upon the order of a Judge.

1318. Subsections (*a*) and (*b*) of Rule 750, as enacted by Rule 1263, are hereby repealed.

1319. Rule 824 is amended by inserting after the word "Canada" in the first line, the words "or to His Majesty in His Privy Council."

CURRENT COMMENT.

MORTGAGES AS TRUSTEE INVESTMENTS.—Decided cases involving the consideration of the question whether trustees are, or are not, liable for a bad mortgage investment are almost as unsatisfactory as cases on the construction of wills. Each case depends on such a special state of facts as to be of little use by way of authority. The recent case of *Palmer* v. *Emerson*, before Mr. Justice Eve, is of the same class as *In re Dive* and *Shaw* v. *Cates*, which occurred about two years ago: see 78 L. J. Ch. 226, 248; L. R. (1909), 1 Ch. 328, 389. In those two cases the trustees were held liable as for an improper investment. In *Palmer* v. *Emerson* they were held by Mr. Justice Eve not to have advanced more than they ought to have done, and alternatively—*i.e.*, supposing them to be otherwise liable—they were held entitled to the protection of section 3 of the Judicial Trustees Act, 1896, as having acted both "honestly and reasonably." The trustees had lent £3,500 on mortgage of property of which part was used as business premises, and they had advanced up to two-thirds of the supposed value. They had not followed the procedure laid down by section 8 of the Trustee Act, 1893, as to obtaining an independent valuation and report, but had acted on a valuation which they had good reason to believe satisfactory. It was contended that, part of the property being used as business premises, the trustees were not justified in lending more than one half the value. Mr. Justice Eve said: "There is no authority for saying that because a portion of the property is used for business purposes, therefore trustees cannot advance more than one-half of the value. The cases only go to this, that trustees are well advised in not lending more than one-half on business premises, but there is no rule to that effect." The observations of Mr. Justice Parker in *Shaw* v. *Cates* (*supra*) were not so favourable to trustees. That learned Judge said that it had been laid down "as a general rule" that a trustee ought not to advance more than "one-half of the value if the property were house property or buildings used in trade, though the rule admitted of exceptions based upon special circumstances."

SNAKES AND BIBLE ON BALLOT.—A peculiar election contest is found in *Conley* v. *Hardwick,* 132 Southwestern Reporter, 140. At a local option election in Powell County, Ky., on each of the ballots used there was placed over the word "Yes" (the local option side an open book, with the words "Holy Bible" printed across its face, and over the "No" (the side opposed to local option) a whiskey bottle and a glass beside it, with the head of a snake protruding from the mouth of the bottle. A number of voters testified that they voted "dry" because they could not go against the Bible. One negro said: "I had to vote under the Bible; the Lord God Almighty would strike me dead if I hadn't." Other evidence was introduced that one of the clerks of election said to the negro voters, as they approached: "If you want to go to hell, vote under the snake; if you don't vote under the Bible." The Court of Appeal of Kentucky holds that a ballot is a means devised by law to secure a fair expression of the will of the people, and it should never contain devices that give to one side an undue advantage over the other. In this case the device used gave to those favouring prohibition the sanction of the word of God, while it held up to those on the other side all the unspeakable horrors of delirium tremens. Since the use of the emblems materially affected the result of the election, they were improperly and absolutely inexcusable, and rendered the election invalid.

ENGLISH INNS OF COURT.—Lincoln's Inn derives its name from having been erected on the ground where the residence and gardens of Henry Lacy, Earl of Lincoln, once stood. Tradition tells us that this nobleman, "being well affected to the knowledge of the laws," in early times induced a body of legal professors to settle on his property. The two Inns which bear the name of the Temple deduce that appellation from the once celebrated mixed religious and military order of the Knights Templar, who in 1183 settled there. Gray's Inn takes its name from the ancient and noble family of Lord Gray of Wilton, but the estate reverted to the Crown long ago, and it is from the Crown the Benchers now hold it as tenants.

The recumbent effigies of Crusaders attest the antiquity of the Temple Church, in the erection of which the early

knights copied the Sepulchre at Jerusalem. Although the superior classic taste of the Benchers of Lincoln's Inn, refusing to adopt any but a Gothic model, rejected the original architectural design of Inigo Jones, their church was nevertheless built by that celebrated man.

There are many interesting old memories of these Inns of Court cherished and beloved by those fond of pondering over the past. Fortescue, who held the Great Seal in the reign of Henry IV., tells us that "from the Temple all vice was discountenanced and banished." Perhaps he was one of those pure spirits that see only according to their own lights. At a later date we learn, from Fuller, that "at the Inns of Court, under pretence to learn law, the student there grows acquainted with lawless boys, and learns to be lawless."

In the reign of Queen Mary we read that the Benchers made a law that the fellows of the Middle Temple might wear beards of three weeks' growth, but not longer, and in Elizabeth's time it was ordered in Lincoln's Inn "that no fellow of that house should wear a beard above a fortnight's growth, under pain of losing his commons, and if obstinate, of expulsion."

These old Inns were in early days the scene of many a gay masque and revel. The last record of such festivity is in 1773, on the election of Mr. Talbot to the woolsack. After an elegant dinner, every member of each mess had a flask of claret besides the usual allowance of port and sack. The Benchers all assembled in the great hall, and a large ring was formed round the fireplace, when the master of the revels taking the Lord Chancellor by the right hand, he with his left took Mr. Justice Page, who joined to the other serjeants and benchers danced about the coal fire, according to the old ceremony, three times, while the ancient song accompanied with music, was sung by one Toby Aston, dressed in a bar gown.

A pegasus, or flying horse, is the emblem of the Inner Temple; for the Knights Templar, before they adopted the lamb, had appropriated a galloping horse with two men on his back as their armorial ensign, and it was emblazoned on their shields. The sacred lamb bearing a banner surmounted with a cross, is the ensign of the Middle Temple, and seems to have been borne by the Knights Hospitallers of St. John

of Jerusalem. The excellencies attached to these emblems were once set forth thus by a rhyming lawyer:—

"That clients may infer from thence
How just is our profession,
The lamb sets forth our innocence,
The horse our expedition."

To which a poetic and dissatisfied suitor is said to have replied thus:—

"'Tis all a trick, for these are shams
By which they mean to cheat you;
But have a care, for you're the lambs,
And they the wolves that eat you!
Nor let the thoughts of no delay
To these, their courts, misguide you,
'Tis you're the showy horse, and they
The jockeys that will ride you!"

THE DOCTRINE OF COMMON EMPLOYMENT.—The doctrine of common employment, whether applied to actions at common law by servants, or under Lord Campbell's Act by their relatives, is so thoroughly established that, comparatively modern though it be, only legislation could abrogate it. It is not, however, applicable, according to the decision of the Court of Appeal in *Groves* v. *Lord Wimborne* (1898), in a case where injury has been caused to a servant by the breach of an absolute statutory duty imposed upon his master for his protection, though the breach of the duty was due to the fault of a fellow-servant. In that case the breach of duty was an omission to fulfil an obligation, imposed by the Factory Acts, to keep certain dangerous machinery fenced. In *Watkin* v. *Naval Colliery Co.*, decided by the English Court of Appeal recently, the action was brought under Lord Campbell's Act in respect of an accident caused by the negligence of an engineer in the service of the defendants in not ascertaining that a cage was in proper working order, and of their manager in allowing more men to go in the cage than it was constructed to carry; and the question arose whether these acts of negligence were breaches of duties imposed by the Coal Mines' Regulation Act on the colliery owners. The Court of Appeal held that the Act did not impose any absolute duty on the owners, and that as they had taken reasonable care to appoint a competent manager and engineer, they were not responsible for the negligence

of the one in the management of the mine and of the other in allowing the machinery to become defective. The decision does not, of course, affect the right of a workman or his dependents to recover compensation under the Workmen's Compensation Act.

AN IMPERIAL COURT OF APPEAL.—Among the subjects suggested by the Commonwealth Parliament of Australia for consideration by the coming Imperial Conference is the question of combining the judicial functions of the Privy Council and the House of Lords in one ultimate Court of Appeal for the whole empire. We are pleased to gather from a reply of the Premier in the House of Commons recently that the question will be considered. It has for long been an aspiration of the dominions that the two supreme appellate tribunals should be combined in form, as they are already to a large extent in personnel. The authorities at home have not hitherto shewn much favour to their desire but as, on the one hand, the opinion of the dominions comes to weigh more and more in the councils of the Empire, and, on the other hand, the position of the House of Lords is likely before long to suffer serious change, the solid and sentimental considerations in favour of amalgamation gain in strength, while the historic arguments for continued separation lose their validity. Much has been done in recent years to increase the representative character of the Judicial Committee of the Privy Council, and to simplify and equalise the conditions of appeal from the various parts of the empire. Its usefulness and the respect which it commands have undoubtedly been increased by the changes. But it remains an anomaly to some extent that the Imperial Court of Appeal in London cannot deal with cases arising in the United Kingdom, and that while English and Scotch Judges may decide upon questions coming from Canada and Australia, the most distinguished of the colonial Judges cannot take part in determining any British case. The Judicial Committee has been called "the most august Court ever known," and "a golden link of empire." But its dignity would be enhanced and the link would be strengthened if it were merged in an appellate tribunal which was the final arbiter of law for the whole of the British dominions. At the time of the Imperial Press Conference we suggested

the assembling of an Imperial Legal Conference, at which representative jurists from the mother country and the colonies should consider a scheme for the reform of the Judicial Committee to fit it for its larger functions. Is it too late to hope that before the meeting of the Imperial Political Conference, or simultaneously with it, the jurists of the Empire should formulate a plan for one Imperial Court of Appeal?

CANADIAN NEWS.

Jas. Woodcock, barrister, Newmarket, has removed to Sutton where he will continue practising.

Colin McLeod has commenced the practice of law at Blairmore, Alta.

A. E. Dunlop, barrister, Kentville, N.S., has removed to Calgary, Alta.

E. L. Elwood, barrister, Moosomin, intends to move to Saskatoon to practise there in future.

J. C. Langlois has been appointed solicitor for the town of Buckingham.

His Honour Thomas Deacon, Senior Judge of Renfrew county, died on the 19th of March at the age of eighty. In 1876 he was appointed a Q.C. by the Government of the Province of Ontario, a similar distinction having been bestowed by the Dominion Government in 1881. He was appointed County Court Judge on January 3rd, 1895.

Geo. Patterson, barrister, Deloraine, Man., has been appointed County Court Judge for the Northern Division of the Eastern Judical District of Manitoba.

T. P. Morton, barrister, Rainy River, has removed to Saskatoon where he will practise in future. His business at Rainy River has been sold to Mr. George Bowie.

The law firm of Wilson & Bloomfield, Vancouver, B.C., has opened a branch office at Vernon in charge of A. Campbell.

Barkley Webster and Harold M. Chase, Kentville, N.S., have formed a law firm under the name of Webster & Chase.

David Tisdale, K.C., died at Simcoe on the 31st March. Col. Tisdale was called to the Bar in 1858, and appointed a Q.C., in 1872. He was elected to the House of Commons in 1887, and in 1896 became Minister of Militia.

O'Brien & Knox, barristers, Wetaskiwin, have opened a branch office at Leduc.

T. D. Delamere, K.C., of the law firm of Delamere, Reesor & Ross, Toronto, died on the 17th March.

H. C. Pope, barrister, Strathroy, has removed to Moose Jaw, where he will practise in future.

Jno. McNeil, barrister, has commenced practice at Glace Bay, N.S.

A. G. Murray, barrister, Gore Bay, is acting as Deputy Judge of Manitoulin during the illness of His Honour Judge Hewson.

R. G. Monroe, barrister, Blairmore, died on the 21st February.

Messrs. Eckstein & McTaggart, barristers, Fernie, have opened an office at Vancouver in charge of Mr. McTaggart.

A Bar Society was organized recently at Lethbridge, Alberta, the first president being L. M. Johnstone, 1st vice-president, H. W. Church, 2nd vice-president, W. S. Johnston, and E. C. Mackenzie, secretary-treasurer. W. S. Ball and R. A. Smith were elected councillors.

Martin Malone, barrister, Hamilton, has resumed practice.

Walter Crowe and Hugh Ross, barristers, Sydney, have formed a partnership under the firm name of Crowe & Ross.

The degree of Doctor of Laws has been conferred by McGill University on Sir Charles Fitzpatrick and Sir Lomer Gouin.

The Dominion Government has decided to grant the urgent request of the Bar of Montreal for three additional Judges for the Montreal Circuit District.

W. B. Allison, barrister, Strathcona, died on the 7th February.

The annual meeting of the New Brunswick Bar Society was held on the 14th February. The Attorney-General and Dr. T. C. Allen were appointed a committee to obtain subscriptions to pay for the painting of a portrait of the late Chief Justice Ritchie, to be hung in the Supreme Court room. The officers for the ensuing year are as follows:—President, R. W. Hewson; vice-president, J. B. M. Baxter; secretary-treasurer, Dr. T. C. Allen; members of the council:—A. B. Connell, H. A. Powell, M. G. Teed, A. J. Gregory, A. R. Slipp, R. A. Lawlor, and J. W. McCready. The president appointed a committee consisting of Messrs. Connell, Guthrie, Baxter, Fowler, Hewson and Lawlor to interview the Provincial Government in order to have the necessary legislation passed providing for the appointment of County Court stenographers, and having amendments made to the present County Court Act.

Horace Pratt, barrister-at-law, Ottawa, has been appointed Deputy Clerk of the Crown, Clerk of the County Court, and Registrar of the Surrogate Court in and for the county of Carleton.

Geo. F. Harman, K.C., Toronto, has been appointed Registrar of the Surrogate Court for the county of York *pro tempore.*

D. Inglis Grant, barrister, has removed from Orillia to Toronto to enter the law firm of Johnston, McKay, Dods & Grant.

R. D. McMurchy, barrister, has severed his connection with the law firm of Frame, Secord & McMurchy, Regina, Sask., and has opened an office on his own account in that city.

T. F. Battle and F. C. McBurney, barristers, Niagara Falls, Ont., have formed a law partnership there under the firm name of McBurney & Battle.

A. B. Thompson, barrister, Orillia, has taken over the law practice of D. Inglis Grant.

G. V. Pelton, barrister, Hastings, has removed to Edmonton, Alberta, where he will practise in future.

The law students of Calgary held a banquet on the 1st of April.

D. Buckles, barrister, North Sydney, has removed to the West.

E. A. Dunbar of the law firm of Dunbar & Dunbar, Guelph, has removed to Calgary.

P. R. Duncan, J. A. Maughan, G. R. Long, J. A. Findlay, N. V. Gilling, S. G. Footner, C. B. S. Phelan, E. T. J. Hyam, I. A. Gooston and A. E. Fulk have been called to the British Columbia Bar.

The annual dinner of the Kent Bar association was held on 20th March at Hotel Garner, Chatham, Ont.

Those present were:—President S. B. Arnold, past president, W. E. Gundy, N. H. Stevens, H. S. Pritchard, Thos. Scullard, His Honour Judge Frederick Stone, His Honour Judge Dowlin, Mayor R. L. Brackin, W. S. Richards, Ward Stanworth, J. W. White, Crown Attorney H. D. Smith, Chas. E. Beeston, John A. Walker, K.C., Magistrate Houston, Matthew Wilson, K.C., Murray Reeve, James Holmes, Edward McDonald and Walter Mills, K.C.

The first toast was to "The King." It was followed by the toast to "Canada and the Empire," responded to by Walter Mills, K.C., of Ridgetown, who made a brilliant address on the eminence of Britain among the nations. He also paid high tribute to the guest of honour for the evening, Judge Stone.

Thomas Scullard followed on the same toast. He dilated on the systematic but humane manner in which England maintained her supremacy. This was the age of the supremacy of the ordinary man. England did not rule by force and by military, but by her common people. He also prophesied that the twentieth century would be the greatest in the history of the whole world, which had learned from bitter experience that war was a detriment to progress. This is happily an age of peace.

Mayor Brackin was next on this toast. He made a witty address. He bespoke the general regret at the loss the city would sustain in the departure of Col. Stone.

The Upper Canada Law Society was responded to by Matthew Wilson, K.C., Magistrate M. Houston and J. A. Walker, K.C.

Mr. Wilson made a scholarly address, taking up the history and work of the Society. He had a few caustic remarks to make on Toronto Police Court matters.

Magistrate Houston followed on the same toast. He was glad to be present to do honour to his former partner, Judge Stone, whom he had known since he was a very little boy. He would miss him very greatly when he was gone. He gave a very interesting review of the Upper Canada Law Society.

John Walker, K.C., also voiced his regret at the departture of Judge Stone. He referred to the remarks of Mr. Wilson regarding Toronto Police Court. The present state of Toronto Police Court did not go to sustain the contention that a police magistrate should not also be a practising lawyer.

The Bench was responded to by His Honour Judge Dowlin, who made a brief but learned address. in which he paid high compliment to Judge Stone. The appointment reflected credit not only on Judge Stone but on the men who had appointed him.

The toast of the evening was that to "Our Guest." In proposing this toast, Mr. Gundy made feeling references to his high regard and friendship for Judge Stone, who had honoured him as a partner for some years past. He then turned over the program to the vice-chairman, S. B. Arnold.

Mr. Arnold stated that he had served his apprenticeship at the Bar with Judge Stone, and he added his compliments and congratulations to those already tendered the new Judge.

The toast to the guest of honour was then drunk with a vim amid the singing of "He's a jolly good fellow."

Judge Stone thanked his brother members of the Bar for their kind expressions which he assured them were most highly appreciated. It was highly gratifying to him to learn that he had gained such high esteem among his fellows, and he hoped he would be able to sustain the confidence expressed in his ability to take up the duties of his new and very high duties in life. It was not enough that justice should be administered, but it is also necessary that the people should be made to feel that justice had been administered.

W. G. Richards and Ward Stanworth responded to the toast to the Kent Law Association.

A bright address, burnished with many appropriate witticisms, was delivered by Mr. Richards, who believed that the Kent Law Association was graced by some of the brightest minds in the country. "I have this to say of Fred. Stone," he concluded, "I have always found him the highest type of man and a gentleman."

Ward Stanworth, who was the first secretary of the Kent Law Association, went into a brief history of the Kent Law Association.

The "Army and Navy" was responded to by H. D. Smith, N. H. Stevens and J. W. White.

Mr. Smith opened with a tribute to his brother officer and brother practitioner, now Judge Stone. He then went on with a brief but very interesting address on the army and navy of the Empire.

Mr. N. H. Stevens thanked the Bar for the kind and hearty reception tendered him and for inviting him as a guest to the banquet. He had been entertained and delighted by the speeches which had been made previously. He kept those present in a continual good nature and merriment with his humorous sallies. Mr. Stevens is an ex-police magistrate, and he gave some of his experiences. He was pleased to find the unanimity of feeling that existed at the appointment of his friend, Fred Stone, to a judgeship. "May the day never cease when the whole world will stand in respect of England's army and navy," said Mr. Stevens. He advocated more military and naval training for the youth of Canada.

J. W. White made an extraordinary reply to the toast. He provided a lot of laughs and added whatever Mr. Wilson might have forgotten to say in regard to the Toronto Police Court. He prophesied that in five years that Judge Fred Stone would be a member of the High Court of Canada.

The toast to "The Ladies" was ably responded to by H. S. Pritchard, Murray Reeve and Edward McDonald. Each made gallant addresses and appropriate references to Judge Stone.

The toast to "The Press" was responded to by Charles Jenkins and Ross Duncan.

Lastly came the toast to "Mine Host, W. S. Richards," which was proposed with enthusiasm; and replied to in appropriate style by Mr. Richards.

The
Canadian Law Times.

VOL. XXXI. JUNE, 1911. No. 6.

MISDESCRIPTIONS IN WILLS.

Once again, (by a recent decision of the Honourable Mr. Justice Riddell,—two decisions in fact rendered. strangely enough, within one week of one another—) the crying necessity of a change in our law relating to misdescriptions in wills is emphasized.

The decisions in question are: *Re Clement,* 22 O. L. R. 121, (20th Oct., 1911), and *Smith* v. *Smith*, 22 O. L. R. 127, (29th Oct. 1911)

The judgment in the former case briefly states the point in question and indicates the law in relation to it, as follows, (22 O. L. R. p. 121): 'Motion by the widow of Daniel Clement for an order declaring the true construction of his will, and for payment out of Court of the applicant's share of the moneys paid in.

October 20th. RIDDELL, J.:—Daniel Clement died having made his will whereby he (1) appointed executors; (2) directed his debts, etc., to be paid; (3) "I direct that my wife, M.C., shall have the south-west quarter of lot No. 3 in the 4th concession of the township of North Dorchester, to have and to hold for and during the term of her natural life;" (4) "I further will and direct that after the death of my said wife the said south-west quarter of lot No. 3 in the 4th concession of North Dorchester shall be equally divided among my children," etc.

As a fact the testator did not own the south-west quarter of lot No. 3 in the 4th concession or any part of it; but he did own the south half of the north half of the lot.

I am asked to construe the will."

The evil wrought by the present condition of our law on this subject is extremely widespread, all the more so from

the fact that a very general impression seems to exist that it is not very material to see that a strictly accurate description of land is contained in a will, as the exact parcel intended can be ascertained by parol evidence, a view strangely enough which will be found to be entertained very largely even by members of the legal profession.

One can readily see the disastrous results which may accrue to a testator's family from the prevalence of this view, since, as in the case now under comment the intended beneficiaries may find themselves entirely cut out of their testator's will.

The writer had occasion some years ago to call attention to this very evil in an article in this journal (17 C. L. T. 201, September, 1897.) As there noted, the result of the cases seems to be, as expressed in the head-note of *Re Clement, supra*, as follows: "The powers of the Courts in giving effect to what they may see, upon the face of the will, was the real intention of the testator, are not unlimited. If the testator has devised land which he did not own, with nothing more in the will to assist, although there is little (or no) doubt that thereby he intended to devise some land he did own, the latter land will not pass, and a well-defined rule of law stands in the way of receiving evidence that that lot was intended. But, if there are any words in the will which would be effective to dispose of the land actually owned by the testator, if the wrong description were entirely omitted, the land passes, and the wrong description is but *falsa demonstratio*, which may be removed by evidence as a latent ambiguity."

Subsequently (as the writer recollects the matter) he communicated with the office of the Attorney-General for Ontario on the subject, suggesting the advisability of having legislation introduced to remedy the evil in question.

This suggestion met with the entire approval of the then Attorney-General who requested the writer to draft an Act for the purpose. This was done and forwarded, but the Legislature was not in session at the time and apparently before the next session the matter had been lost sight of both by the writer and the Attorney-General's office and the evil still remains unremedied.

The present seems an appropriate time to revive the matter. It will be seen that what is required is an Act

supplying in every case the words for which the Court so anxiously searches the particular will which happens to be before it in order to warrant the granting of the relief which the ends of justice so urgently demand.

The suggestion made by the writer in the article in question (17 C. L. T. p. 219), was as follows; From what has been said, it will appear that the difficulty in dealing with cases of this kind lies in the fact that, although the legal rules governing the interpretation of wills are entirely rational, intelligible and well-settled, the hands of the Judges, in applying them to individual cases, are either fettered or free according to the caprice of the testator in wording his will. Can any remedy be proposed that will free the hands of the Judges in granting relief, without at the same time exercising a disturbing influence on the present well-understood rules of interpretation? Probably most lawyers will agree with us that nothing is much more objectionable than statutory tinkering with established law; so that if any remedy can be suggested, it will, it seems to us, be the more acceptable if it leave the present rules of construction unimpaired. There would no doubt be different ways of effecting the end in view. We shall not presume to do more than offer a suggestion. To us it seems that if the legislative authorities felt disposed to deal with the matter, the preferable method of procedure would be to abstain from interfering in any way with the law or authorities as they at present stand, and direct attention solely to the wills themselves. We think a short enactment to the following effect would answer the purposes, viz.: "Unless an intention to the contrary therein appears, all wills shall be construed as though the subject of every devise or bequest therein contained were immediately preceded by the words, 'my property, being,' or words to the like effect."

A provision of this kind, preceded by an appropriate preamble indicating the evil to be removed, would, we think, cover the whole ground, and effect a very radical improvement in the law in its application to this subject. The adoption of this would seem to us to be attended by the advantage that each individual case would rest upon its own circumstances, and it would remain with the Court to determine whether it was or was not a proper case for affording the relief asked.

The question was again dealt with by the writer in a letter to this journal in September, 1900 (19 C. L. T. 80), in which the matter is referred to as follows: "The hardship of the rule of law in such cases has been felt and deprecated by the Judges, at the same time that they felt themselves constrained to enforce it. See *Hickey* v. *Stover*, 11 Ont. R. 106. A very simple and obvious remedy might be applied in this case. It is indicated by the judgment of the Chancellor in *Hickey* v. *Stover*. It is clear that the learned Chancellor in dealing with that case felt himself trammelled by the fact that, as the law stood, there was no warrant for "introducing the assumption that the testatrix meant to devise her own land." No one for a moment doubts that in ninety-nine cases out of a hundred that is the intention actuating a testator when he sits down to make his will; an intention to deal, in his will with his own property, and not with property belonging to somebody else. The amendment, therefore, which I would suggest is the introduction of that assumption by legislation, in all cases.

The writer ventures to predict that unless some remedy is applied, no very lengthy period will elapse before further cases of a similar nature will appear in our legal reports, indicating the hardship and expense to which the public is constantly being put by the existence of the evil now under comment.

F. P. BETTS.

London.

FRENCH CIVIL LAW UNDER BRITISH RULE.*

When the committee entrusted with the organization of this first annual conference did me the honour of selecting me as one of the lecturers, my first preoccupation was the choice of a fit subject for such an occasion as this. I sought for it everywhere. At first, yielding to a very natural impulse towards the more gracious components of this distinguished audience, I thought it would be useful and interesting to take up the topic of woman.

*Address given by P. E. Lamarche, LL.M., of the Montreal Bar, before the Judiciary and Bar of Montreal, at the first annual conference of the Bar of Montreal, at the Court House, Montreal, 29th April, 1911.

But, upon reflection, I concluded that this topic should be set aside.

It would have been impossible for me, ladies to prove to you that the legislator has always acted the part of a gallant gentlemen with respect to yourselves. I might even have had considerable difficulty in convincing you that he did not actually ill-treat you. So that, placed in the awful alternative of hiding the truth or displeasing you, I took refuge in a more abstract region of law, leaving to some happier successor the privilege of dealing with you in some maturer deliverance.

Hence it is that you must rest content to-night with a frugal and traditional dish from the legal table. I shall speak to you purely and simply on the subject of law itself.

Yet there is the very subject which one should shrink from, in addressing such a gathering as this one. And when I see before me the most eminent personalities of the Bench and the Bar, assembled to hear a mere novice speak to them of a science in which they are past masters, and when I reflect upon the difficulty of the task I have imposed upon myself, I cannot help realizing—though without a more pretentious parallel—the state of mind of the Athenian orator who, to correct the defects of his speech, went rehearsing his utterances to the majesty of the waves of the ocean, filling his cheeks with stones in order to overcome the falterings of his inexperienced tongue.

Nevertheless, ladies and gentlemen, I have this assurance at least, that it will be very hard for me to be obscure, when surrounded by so many lights.

You are all familiar with the legal maxim "*Nemo auditur suam turpitudinem allegans,*" "No one is heard alleging his own fault." You would doubtless immediately and severely apply it to me, if I venture upon an explanation of the defects and weaknesses of this attempt. Your sagacity will not fail to discover the reason, and your fraternal indulgence to condone it.

When after fourteen years of labour and intellectual travail, the genius of Montesquieu bestowed upon France and upon the world that imperishable monument of social philosophy, "The Spirit of Laws," in the preface of the work the author declared to his contemporaries that his object had been to promote love for king, country and law.

In offering to you to-night the fruit of my modest research upon the origin of our civil law, could I, in like manner, compass a more noble or more useful object than to lead you to a greater reverence for the sovereign authority which has granted us the laws under which we live; to a greater love for the country on whose soil justice has sown, grown and nourished our freedom and privileges as citizens; and, finally, to a fairer appreciation of those laws which in your everyday relations inspire your civil acts and safeguard your most sacred rights.

The language of human justice is the conventional law of men. Is it necessary to state that, in so far as it is the product of the human mind, it is marred by many imperfections? On the other hand, as a necessary consequence of those imperfections, it is eminently perfectible, and it is to the thorough study of its principles and to the wisdom of its application that the social order largely owes its moral uplift and, to a certain extent, the impulse of its material progress.

The legal language manifests itself, according to epochs and peoples, in diverse idioms.

In the circle of their ordinary relations, the Frenchman, the Englishman, the German, the Italian, speak vastly different languages, which nevertheless must express ideas common to them all and formulate identical conclusions.

The same is true of their legal relations. Under different forms, applying different principles, often seemingly incompatible, the various human legislations have their vocabularies, their axioms, their maxims, their dialects and their idioms, which for the most part reflect the political institutions and the mental habits of the peoples who have made the laws.

Yet, in spite of this diversity, they have a common action, a common tendency, a convergence to a common focus: the equitable regulation of the relations of man to man, and of man to society, according to the eternal principles of justice.

This necessary lack of uniformity in the human legislations, imperiously brought about by circumstances of time, place, and temperament, all beyond the control of man, invariably proposes problems bristling with difficulties of the gravest character whenever a territory inhabited by a civilized nation and ruled for a long period by settled laws is suddenly taken over by a foreign state.

That problem arose, in its most complex form, when Canada was conquered by Great Britain, and it was only fourteen years afterwards that England definitely solved it by establishing immutably the foundations upon which our private legislation was to be built.

It is with the solution of the problem, the causes thereof, and the effects it has brought about, that this address is concerned.

When a judgment is to be delivered on an important character in history, it is not his own actions alone that must be scrutinized. The times in which he lived must be taken into consideration, since they are the setting of his actions. One must go back to his birth, and account be taken, not only of the circumstances of his origin, but often of the circumstances which have preceded his coming. Otherwise the judgment delivered would be incomplete, and frequently unjust.

If this is true when men are to be judged, it is even more true when those institutions are on trial which are based upon the acts of men.

That is why, before studying the immediate genesis of our civil law, it is proper to cast a retrospective eye upon the historical events accompanying or preceding it. These circumstances are inseparable from the central fact, because of the intimate relation they bear to it.

Very often, in order to trace the source of the most placid lake, one must go back to the impetuous madness of a torrent far away back in the mountains. To discover the origin of our peaceful and harmonious legislation, we shall have, treading the paths of history, to go back to the dark and now forgotten days of war.

It was the autumn of the year 1760. France and England, unable to find in diplomacy the solution of their quarrels, had appealed to the uncertain but supreme arbitrament of arms, and for four years, in Europe and in America, commerce, progress and civilization, had been marking time amid the terrible ravages of a war that was to be prolonged to 1763, and which is therefore known as the Seven Years' War.

On this side of the Atlantic, though, the curtain had fallen on the last act of the drama.

Quebec had surrendered. At Montreal, yielding to overwhelming odds, Lévis had broken his sword that he might not give it up to the enemy, and Monsieur de Vaudreuil, postponing the promptings of his chivalrous soul to the safety of his people, had capitulated.

The capitulation submitted the entire colony to British arms.

History, the repository where lie pell-mell all the great facts affecting humanity, registered on that day, in the desperate act of a handful of abandoned soldiers, the last struggle of French domination in a country which France had brought out of its nothingness, and raised from aboriginal barbarity of the worst kind.

Little by little, the soldiers, the officers, the professional men, the merchants, the middlemen, all those in short whose economic life is grafted upon the lives of others and fattens upon the accidents of existence, saw in this change of masters a social upheaval incompatible with their survival, and sailed for France.

Only those who had attached themselves to the soil by the deep roots of their august occupation, and who looked to the glebe itself for their daily bread, the glebe which irrespective of forms of government always feeds and supports the worker, only those remained faithful to this land.

Their primitive philosophy did not make them disdainful of "the few arpents of snow," but driving into the soil of America the stakes of the claims of future generations, they learned to await, with that perseverance which is the best substructure of nations, the springtime of a people who were to turn the arpents of snow into arpents of ripening wheat.

1763 brought the end of the war. On the 10th of February, French royalty, weakened by British artillery and the kisses of courtesans, had to accept the disastrous Treaty of Paris, by the terms of which the queen of nations severed off her members in order to purchase the integrity of her head and body.

The cession of Canada by this treaty of peace transformed the actual possession of the land by the British into a definite and complete right of ownership.

The military standard of Great Britain had after seven years of unremitting efforts won its way to supremacy over

the world. It now remained for its commercial standard to complete the work of absolute domination.

A foreigner setting foot for the first time on the soil of the province of Quebec, and coming into contact with our political institutions and laws, is often astounded when he finds that, under the folds of the British flag, we are still ruled in civil matters by the French law. And he naturally looks for an explanation.

The explanation is not always given in the same way. In fact, the origin of our civil law under British rule has been the subject of a very hot controversy among us.

Inasmuch as at this late date this question, though attractive enough, possesses historical interest only, we shall be able to debate it coolly, without other preoccupation than this, that the truth be made manifest.

At the time of the conquest Canada was ruled, in its public as well as in its private law, by French legislation, that is to say by the custom of Paris, by those French ordinances enacted after 1663, and registered in the Superior Council, by the ordinances of the Superior Council itself, and by the ordinances of the intendants, who personified civil authority under the French *régime*.

The preservation of the French civil law as the private law of the Canadians was one of the questions particularly taken up by the Marquis de Vaudreuil when he surrendered the colony to General Amherst, and there is in this country a widespread impression that the continuance of the French civil law was formally guaranteed the Canadians by the capitulation of Montreal.

On the other hand, there are many who have found in the terms of that capitulation a formal substitution of English law for French law.

I think a close scrutiny of this important document, together with the principles of the *jus gentium* will lead us to a different conclusion.

According to Bluntschli, capitulations are agreements whereby a body of troops, a ship or a fortress is surrendered to an enemy.

Other distinguished writers admit that a whole province may be the object of capitulation.

A capitulation may be conditional or unconditional.

In the first place it partakes of the nature of a bilateral contract, the stipulations of which bind the sovereigns, pro-

vided they do not exceed the authority of the commander—an authority occasionally express, but oftener implied and varying according to the rules of war.

If the capitulation be unconditional it is submitted to the rules of the *jus gentium*, as to all its consequences.

The capitulations of Quebec and Montreal are conditional capitulations, absolutely in proper form, divided into several articles of proposals of the besieged, with the answers of the besieger written over against them.

With respect to this article the capitulation of Quebec affords little interest. Its importance is purely local, and the question of the laws to prevail is not even raised in it.

On the contrary the capitulation of Montreal brought about the surrender of all the French troops in Canada, and it may be regarded, from a legal point of view, as the surrender of the colony itself.

Let us now consider the parts of that capitulation which refer to the civil law.

By the terms of article 42 of the capitulation of Montreal, M de Vaudreuil required the preservation of the French civil law for the inhabitants of Canada.

Textually it reads as follows:

"The French and Canadians shall continue to be governed according to the custom of Paris and the laws and usages established for this country, and they shall not be subject to any other imposts than those which were established under the French Dominions."

That request, you see, had nothing ambiguous about it. It was clear and explicit.

General Amherst did not reply to this article by writing in the word "Granted," which would remove the question from the field of discussion, nor by writing in the word "Refused," which also would have rendered all debate impossible. He replied by referring to his answer to the article immediately foregoing, that is to say, by the words "They become subjects of the King."

Before interpreting this expression, let us remark, first, that in the answer of the English general there is a striking illustration of the difference between English doctrine and the doctrine of most other nations on the consequences of military occupation.

According to almost all the authors, the inhabitants of a region militarily occupied after a capitulation remain sub-

jects of the former sovereign, in theory at least, until a definite cession by treaty intervenes.

On the contrary the English doctrine holds that the inhabitants of territory subject to British arms become immediately, *ipso facto,* British subjects.

This will explain the form in which the answer of General Amherst to article 42 is cast.

The sense of the words "they become subjects of the King," and their juridical effect could not be submitted to a better criterion or to a better rule of interpretation than the principles of the public and political law of England which was gospel for the stipulating general.

These principles on which our parliamentary institutions have been modelled are too well-known to require extended commentary.

Let us bear in mind, though, that under the constitutional English monarchy, the subject of the King falls directly under the authority of the Crown, whose principal powers are exercised by the joint action of the sovereign, the Upper and Lower House, and, occasionally, by the sovereign alone, in virtue of royal prerogative.

One of the principal powers of the Crown is legislative power, the right to make laws for the subjects of His Majesty.

The reply of General Amherst was, therefore, complete, and absolutely to the point. By saying "they become subjects of the King," he declared that the inhabitants of Canada fell under the legislative authority of England, and would be ruled by such laws as His Majesty or his representatives might in the future be pleased to make, either provisionally or definitely.

In other words that question was left for the sovereign to decide.

Amherst did not deem it expedient, by granting M de Vaudreuil's demand unreservedly, to block or limit for the future the legislative powers of his government.

It would be an interesting question to study, were we to inquire to what extent Amherst was authorized to bind his sovereign in legislative matters, but the inquiry would take us too far from the subject. For the time being, let us take it for settled that the answer of the English general took away all possible effect from article 42.

The argument of those who see in the words "they become subjects of the King," a formal introduction of Eng-

lish law cannot be taken seriously, inasmuch as even for the subjects of the kingdom the legislative power is exercised by a series of positive and formal acts of the competent authority. This would be still more true of the new subjects in a conquered territory.

A Canadian author of very great worth, Mr. Edmond Lareau, traces the origin of our civil law under British rule back to the capitulation of Montreal, holding that the French civil laws were impliedly guaranteed by the granting of the stipulations of article 37.

That is the article which protects the property rights of the inhabitants of the country.

This is how M. de Vaudreuil formulated his demand, which was granted by General Amherst:

"The Lords of Manors, the military and civil officers, the Canadians as well in the towns as in the country, the French settled or trading, in the whole extent of the colony of Canada, and all other persons whatsoever, shall preserve the entire peaceable property and possession of their goods, noble and ignoble, movable and immovable, merchandise, furs and other effects, and even their ships; they shall not be touched, nor the least damage done to them, on any pretence whatever. They shall have liberty, to keep, let or sell them, as well to the French as to the British; to take away the produce of them in bills of exchange, furs, specie, or other returns, whenever they shall judge proper to go to France, paying their freight as in the 26th article. They shall also have the furs which are in the forts above, and which belong to them, and may be on the way to Montreal; and for this purpose, they shall have leave to send, this year, or the next, canoes fitted out, to fetch such of the said furs as shall have remained in those posts."

"Preserve the property," says Mr. Lareau, "means to keep the laws which regulate property." "It therefore follows that it must be regarded as certain," he concludes, "that by the capitulation, the country had the promise that it would not be deprived of its civil code."

I would be disguising my true opinion if I appeared to share Mr. Lareau's. And a lecturer must not abandon sincerity in order to appear more orthodox.

As we have explained in the beginning, the capitulation of Montreal is a bilateral contract entered into by the accredited agents of two belligerent nations.

We can, therefore, submit the document without hesitation to the ordinary rules of the interpretation of contracts, in order to find the sense and purport of its text by seeking the intent of the parties to it.

As far as M. de Vaudreuil is concerned, nothing in article 37 reveals any other intent on his part than the desire to protect the inhabitants of the country from extortion and pillage.

It is only in article 42 that he formulates, in the manner befitting a man who closes one chapter to open another, his clear and positive demand that the use of French law be maintained.

But it is the intent of General Amherst which is especially interesting to consider.

For the purposes of the debate, let us grant, temporarily, that he could discuss the continuance of the French civil law as a right accessory to that of peaceable possession, granted by article 37. Is it reasonable to suppose, then, that the English general, wishing to grant the use of that law would have failed to reply affirmatively to the direct demand of article 42, in such a manner that it would have to be gathered solely and simply from his acquiescence with the terms of article 37.

Moreover, even by this simple deduction, it is not logical to put aside the formal reply to article 42. "The formal reply," I say, because, for the reasons already given, the words "they become subjects of the King," could not mean anything but a desire on the part of Amherst not to decide the question himself.

Now, independent of this interpretation, can it be said that the use of the French civil law was in any way impliedly guaranteed by the terms of article 37 of the capitulation.

The very text of this article guarantees the respectful treatment of vested rights, and as an explanatory corollary proposition, it grants the right of selling, renting, exchanging, etc. It is the right of ownership undiminished: "usus," "fructus," "abusus."

To assert that the preservation of the right of ownership necessarily implied the retention of the French civil law, would, according to my view, be equivalent to the proposition that English law, or indeed any legal system but that of France, was inadequate to safeguard the great principle,

admitted by all civilised nations, and lying at the base of the social structure—the right of ownership.

Doubtless, with the rights of ownership guaranteed by article 37, all other vested rights were also protected: the servitudes, the charges, the mutations and conveyances already contemplated at the time of the capitulation, but not yet implemented. But these, properly speaking, were but the consequences of prior acts, subject to the old law, and having nothing in common with any future conveyance made by one not possessing them under those identical conditions.

Moreover, to conclude that the whole civil law was guaranteed as accessory to the right of ownership, is, I think, concluding from the particular to the general proposition.

For, if the right of ownership and the laws regulating it do form an important part of the body of the civil law, it is certainly not the whole civil law.

Civil law regulates ownership and the things submitted to it. True. But civil law regulates persons as well, and the acts of those persons in the domain of civil relations

"*Omne autem jus quo utimur, vel ad personas pertinet, vel ad res, vel ad actiones,*" Gaius cogently said, and that is the maxim which is the foundation of our theory of personal, real and mixed statutes.

Thus the laws relating to marriage, to take one of a hundred examples, deal with many things which are not even remotely connected with the right of ownership.

Another confirmation of our opinion, is that the Treaty of Paris, signed three years after the capitulation, and expressly ratifying the guarantees given the Canadians by General Amherst, is absolutely silent on the subject of the civil law. This leads to the conclusion that those who drew up the treaty of peace also wished to leave wholly untrammelled the legislative power of the English Government, exactly as Amherst had done when he said: "They become subjects of the King."

Do you seek further proof? Here is one, circumstantial, but of great corroborative value.

After the cession, the Canadians had serious grievances, and for ten years it may be said that they stoutly demanded the restoration of the French civil laws.

On several occasions the echo of their revendications reached the ear of the sovereign, and valuable documentary

records of their complaints have come down to us, asking redress in the matter.

If the use of the French civil law had been guaranteed, even impliedly, by the capitulation of Montreal, surely the contemporaries of its signatories would have been the first to be aware of the fact. If so they had in hand an irresistible argument in favour of their request, that to refuse it would involve violation of a solemn agreement. They would have invoked that argument to the probable exclusion of all others.

And yet, if we examine, for instance, the petition of the Canadians to the King, regarding the laws and the judicial system, dated the 7th January, 1765; if we study the petition of the inhabitants of Canada to the King for the restoration of the French laws and customs which was drawn up in 1770; if we peruse the petition of the French subjects to the King in February, 1774, praying for the re-establishment of their civil law: we will find in them arguments based upon public order, equity, the *jus gentium,* the interest of the colony and its subjects, the toleration extended to the French laws during the period of military occupation, but nowhere is the affirmation found that the agreement intervening between Amherst and Vaudreuil has been broken.

For all these reasons I humbly submit, inviting correction if I am wrong, that it is not in the capitulation of Montreal, as a written document, that the origin of our civil law under British rule is to be found.

Now, if you will allow me, let us put aside the capitulation of Montreal, regarded as a pact, to consider the capitulation itself as an event, examining its juridical effects according to the law of nations.

Heffter admirably sums up the thought of the principal writers, when he says:

"The total or partial conquest of a territory has not for effect the substitution of the conquering government for the conquered as long as the event of the struggle is still in doubt. It is only after inflicting on the conquered people a complete defeat (*debellatio, ultima victoria*), after removing all possibility of further resistance that the victor can establish his own domination, by taking over the sovereign power."

Now the submission of the colony was far from coinciding with the submission of the sovereign nation. France

was not yet *hors de combat.* On the contrary the war was waged for three years more. The capitulation of Montreal did not prevent France from ranking among the great nations of the earth, although it weakened her to some extent.

Therefore the capitulation and the military occupation, according to international law, had not abrogated completely and definitely France's sovereignty over Canada, although, as a matter of fact, England had already begun to apply the rules of her public law, which made the inhabitants of the country subjects in fact of the British Crown.

As an illustration, apply the rules of our civil law to this problem of international law. It might be said that one of the nations owned Canada under a suspensive condition, while the other owned it under a resolutory condition.

But, if military occupation cannot destroy the sovereignty *de jure,* and substitute another for it, it is nevertheless capable of vesting in the commander of the troops occupying the territory certain extensive powers which are like many dismemberments of sovereignty itself.

The greatest of these powers is the only one which now concerns us. It is this, that military occupation gives the right to application of martial law.

Martial law is but the exercise of military authority, in conformity with the rules and customs of civilised warfare.

It is then quite right to say that the British taking possession of Canada, the French civil laws were not abolished but only suspended in favour of martial law.

But this suspension was only theoretical, for within the jurisdiction of the civil law, the martial law did little more than continue the pre-existing laws. Important changes were made in the system of judicial administration, in the redistribution of territorial jurisdiction, and in procedure, but the basis of the law was not altered.

Several of those entrusted with application of the substantive law did not know the first word of it. The result was a chaos that can be easily imagined. In many cases, judgments were influenced by the English law, even when the Judge himself was unaware of it. Nevertheless it can be fairly said that, as a rule, the French civil law continued in application, more or less awkwardly, during this period of transition, and, be it said to the credit of Governor Murray, justice and equity were generally respected.

The military *régime* lasted three years. In 1763 Canada was ceded to England by the Treaty of Paris. Thenceforth British sovereignty was established *de jure*, as it had been *de facto*.

A great many people have held that at the cession, the whole body of English law was automatically brought into being in this country.

Here a most important distinction must be made. The proposition is true, as regards public and administrative law. As regards civil or private law, it is erroneous.

By the final cession, the sovereignty of France over Canada completely disappeared forever. With it went all the country's political institutions, and all the machinery for regulating the relations of the subject to his former sovereign, which the military occupation had only suspended provisionally.

In their stead, came British sovereignty and, accessorily, all that was necessary for its maintenance. First and foremost, a new public or administrative law was substituted for the old.

Therefore the public or political law of England was here implanted with the establishment of British sovereignty.

With respect to private law, there is an important difference. As there is no relation between them, a change of sovereignty need not infringe upon it.

Accordingly, it is a principle of international law, recognised by English public law, that the private law of the conquered country subsists as long as it has not been expressly altered or replaced by a formal act of the conquering nation.

Therefore the cession did not abolish the French civil law.

Before dealing with the introduction of the English laws, we must dispose of a very important question.

Could England, on the morrow of the cession, substitute the English civil law for the French?

If the inquiry is limited to a strict examination of England's title to Canada, the question must be answered in the affirmative.

For, having become immutably the owner of the conquered territory, its sovereignty was established in all its

fulness, with all its powers, among them that of abolishing the existing system of civil law and replacing it by new legislation.

Nevertheless the exceptional nature of the acquisition of this country by England precludes a decision of the question upon such narrow rules, and forces us to look at it in the light of higher and more general ideas.

War properly so-called is terminated by the signing of a treaty of peace. Its consequences keep on happening long afterwards, and war makes victims long after the cannon has been silenced, not in the way of bloodshed, but by the strangling of the most sacred rights.

It was but natural that *jus gentium,* the law of nations, should aim to prevent and diminish, where it could, after-effects such as these.

On the morrow of a war, the sudden, rigorous and intempestive application of a right such as the making of new civil laws, can in many cases become inimical to public order, and a denial of justice to the individual.

Public international law, guided by justice, lighting its footsteps by the lamp of civilization, has taken upon itself, by the voices of its most authorised expounders, to make a wise and equitable regulation of the right.

Savages fight to exterminate. Civilized men fight that peace may come Peace being attained, the end of war is accomplished. It is then in order to repair the ravages of the fight. Order must be restored, and not disorder promoted.

Now the sudden substitution of the civil law of the victor for the civil law of the vanished constitutes, in its way, as serious a breach of order as war itself.

Precious rights are trampled under foot on the borderland between two systems of law which follow each other abruptly and without transition The new subject, often a stranger to the actual fighting, and in any event not liable to punishment, since peace is restored, is obliged at the expense of his fortune, if not of his freedom, to seek in a labyrinth of law, filled with unknown pitfalls, the rule of his civil acts, or the remedies available to cure his wrongs.

Civilization wished to remove this danger. While keeping firm in the hands of the victor the sceptre of supreme command and legislative power, it desired that the exercise of the legislative power should not become oppressive, or in-

compatible with justice, with the respect of vested rights, with the order, security and tranquillity of the subject.

Now, the people of Canada had never known any civil laws but those of France, and they did not understand the conqueror's tongue.

Can a state of things be imagined more calculated to call for the application of the principles of equity and justice that I have just enumerated?

But the application was not made.

Nothing shews absolutely that England's intent was to order the subverting of the private law domain at the cession. Public documents of the time rather reveal another intention altogether.

But Governor Murray, deplorably interpreting the royal proclamation of the 7th of October, 1763, and in flagrant fashion exceeding the powers expressly conferred upon him in matters of legislation, enacted an ordinance on the 17th of September, 1764, which introduced *holus bolus,* and even without promulgation, the body of English civil and criminal law.

About a century afterwards, sitting in trial upon the consequences of that ordinance, our civil Courts, in the famous cases of "*Stuart* v. *Bowman*" and "*Wilcox* v *Wilcox*," decided peremptorily that the ordinance of Murray was absolutely null and void, as unconstitutional, that it had never had the effect of legally introducing English law, and that, in consequence, the French civil law had never been abolished.

The question is not debatable now, but it is interesting to read in volumes 1 and 2 of the "Lower Canada Jurist," the opinions delivered by Sir Louis Hypolite Lafontaine, Mr. Justice Vanfelson, and the two Judges Mondelet. More interesting still is the admirable work entitled "A plan for settling the laws and administration of justice in the Province of Quebec," attributed by some to Hey, by others to the Baron Masères, and in which the Judges I have just mentioned found their most convincing arguments.

In spite of its unconstitutionality, Murray's ordinance subverted the tranquillity of the country by introducing suddenly *de facto* the body of English law, and the subsequent period, up to the Quebec Act, of 1774, was one of the most wretched of our history.

The civil law, or common law, of England, which the inhabitants of the country could not even get information upon was applied with disastrous results.

On the other hand, the century-old roots of the French customs resisted the axe of the legislator, and it is stated that for ten years English and French laws were indiscriminately applied, in a disorderly fashion, which seemed to ensure the shipwreck of the spirit of law itself, in the eddy and conflict of incompatible legislation.

Such a state of affairs could not last, without prompting recrimination on the part of the inhabitants of the colony.

Petitions and complaints began to pour in upon the colonial office.

On the one hand, appeals to British justice to restore the French civil law; on the other hand, formal opposition registered by a few English merchants to the granting of any privilege whatsoever to the vanquished.

It would be a grave historical error, should we judge the English people of the period by the mentality of a band of adventurers who swarmed to the new colony, not to develop its resources and implant new generations, but to cut off their pound of flesh and run away to gorge upon it elsewhere.

Above this popular clamour and these conflicting interests, the voice of enlightened English jurists was heard and hearkened to.

The reports of York, of de Grey, of Thurlow, and of Wedderburne are splendid pages of political law in which one knows not what to admire the more, their simplicity of form and clarity of expression, or their elevation of ideas, their lack of prejudice, their regard for justice and the proper interests of the British Empire.

Basing their opinions upon principles of public order and upon rules recognised by the *jus gentium* of the period, they urged the re-establishment of the French civil laws.

Governor Carleton, too, could see no other solution of the problem, no other remedy for the ills of the colony. His reports and his private letters shew that to have been his constant opinion.

Francis Masères, afterwards Baron Masères, who was at one time Attorney-General of the colony believed that a blend of English and French law would serve the country's interests better. His works upon the question are volumin-

ous, and prove his erudition and remarkable intelligence. He was not only a great jurist, but a great mathematician as well, and some of his reports almost turn out that facet of his character. Dr. Marriott was the one who shared Masères opinions most heartily.

England was now sufficiently well informed to be convinced of the urgency of the reform.

On the 2nd of May, 1774, in the House of Lords, the Earl of Dartmouth introduced a Bill, which afterwards became the Quebec Act.

Its object was the abolition of all prior legislation and the laying of a new foundation for future legislation in the colony.

The criminal law was to be the common law of England, and the private law the civil law of France as it was at the time of the cession.

Moreover the absolute freedom of willing was introduced into the country.

Fifteen days later the Bill was unanimously read a third time, and sent to the Commons.

Before the representatives of the people, the Bill formed the subject of a long debate, and of a special inquiry, in the course of which Governor Carleton, Francis Masères, Dr. Marriott, and M. de Lotbinière were summoned as witnesses, and gave their opinions on the proposed measure.

After such amendments as do not relate in any way to this question, the Bill was reported by the Commons on a division of 56 to 20 In its amended form it was sent up to the Lords, where it met with opposition. The Earl of Chatham, then seriously ill, was carried to the House to fight it. He found only six of the quorum to support him, while twenty-six voted for the Bill.

Nothing was now wanting but the royal assent to make it law.

At this stage it met with opposition from an unexpected quarter.

On the 22nd of June, His Majesty, King George III. was getting ready to go down to the Commons to prorogue Parliament, when the Lord Mayor of London, several aldermen, the Recorder, and some 150 members of the Common Council presented themselves at the palace, bearing a petition which prayed the King to withhold his assent from the Quebec Act.

The King did not heed, and instead of proceeding to the Commons, he went straight to the Lords and sanctioned the now famous Bill.

For a just appreciation of this measure I can do no better than to quote the words of the sovereign himself, upon giving it legal existence. He declared that it was based upon principles of the purest justice and would have the best effect in allaying the discontent and promoting the happiness of his Canadian subjects.

The use of the French law, guaranteed to the inhabitants of this country by international law, was thus confirmed to them by a formal act of the British Parliament.

It was the first time that the parliamentary machinery had been set in motion for the benefit of the colony, and its first piece of work was one of eminent justice.

Later, in 1791, England was to divide the country into two distinct territories, Upper and Lower Canada, giving the former English common law, and preserving in the latter the legislation established by the Quebec Act.

That was the introduction of Constitutional Government which trained the Canadians for Responsible Government.

The constitution of 1791, which continued the guarantee of the French civil law to us was the subject of one of the most celebrated debates in the annals of the Commons of Great Britain, and indeed of all British parliamentary history.

On that memorable occasion, while the temple of our constitution was being erected, a sublime and poignant accident happened, when the lifelong friendship of Burke and Fox, which for twenty years had not been dizzied by the political heights, suddenly toppled from its footing of mutual admiration and esteem to smash itself on the hard pavement of their political opinions

There was an obliteration of personal interest in the apotheosis of public interest.

At the time of the Union of the two Canadas in 1840, and by the British North America Act, at the time of Confederation, all the guarantees of the Quebec Act were reaffirmed and ratified, and to-day, under the constitution, there is only one power which can change or modify our French civil law, the power directly responsible to the free citizens of this province, the Legislature of Quebec.

Not only do we possess a clear title to the private legislation which rules our acts, but we are the trustees as well of the keys of the vault which wards from them the assaults of time.

In the course of the debate over the Quebec Bill in the British Commons, those most strenuously opposed to its enactment urged, among other things, that to allow a single vestige of the French domination to remain would be to give up all hope of permanently attaching the French-Canadians to the British Crown.

Providence provided our compatriots with a good opportunity of removing that impression and of expressing their gratitude for the recognition of their rights.

Not more than two years after the passing of the Act, the troops of the rebel Americans which had invaded Canada in the hope of forcing it into complicity in their efforts to shake off British rule were repulsed with heavy loss. And according to the testimony of a distinguished English historian, without the help of the French-Canadian volunteers, Carleton would have found it impossible to retain Canada for the British Crown.

But, what have we done with the French civil laws—the enjoyment of which was thus granted us?

We have kept them substantially intact, but we have modified their form.

Moreover, yielding to the exigencies of progress and to motives of public order, we have cleared our civil law from certain relics of feudalism which were no longer suited to this age. The abolition of seignorial tenure in 1854, rendered a signal service to society without violating any vested right.

Later on, at the time of Confederation, when Canadian statesmen were endeavouring to weld together the British possessions in North America, in such a way as to make them the compact foundation of a great nation, our own legislators were binding together the scattered elements of our civil laws, to perfect and co-ordinate them, and add the final touch of codification, which has made our civil law a private legislation that will stand comparison with those of the most civilised nations.

One more consideration, and I am done. We have said and we have tried to prove that the continuance of the French civil law in this country had been commanded by the

jus gentium, and that the Quebec Act was but the doing of an act of justice and the protestation of an inalienable right,

To be exact, we must nevertheless admit that the *jus gentium* did not require this continuance to be permanent. But this permanency also is now assured, and we owe it to the free but irrevocable act of Great Britain.

That was one of the good consequences of its admirable colonial system.

All the great fallen empires were built upon force and maintained by fear. If the British Empire, the marvel of the world, offers guarantees of stability and longevity hitherto unparalleled by any other, it is because it has been founded on the solid basis of the immortal principles of freedom.

The large measure of autonomy which England has granted to its numerous flourishing colonies, has made them grow and prosper without desire to shake off a domination which was never a burden, a sovereignty which was never a yoke.

That is the vital principle of the incomparable empire within whose boundaries we are content and proud to live in freedom.

As for us, citizens of the old province of Quebec, whose shield asserts that she remembers, faithful to our history, our traditions, our past, measuring the intensity of our affection by the respect extended to our rights, in the hour of thanksgiving, as in the hour of just revendications we shall always keep burning in the aisle of the imperial temple the pious and discreet lamp of a loyalty that has flamed undimmed, not only throughout the days of peace, but in the darkest nights of our national existence.

What matter the intrigues without and the plottings within? Individual liberty now, as in the past, will be the most formidable rampart of the imperial fortress.

And the strongest buttress of that liberty is the law, which orders it and prevents its degeneration into license.

Let us then love the law. In spite of fallibility of justice, in spite of the tactless zeal of the prosecutor and the weakness of the counsel for the defence, in spite of the myopia and the inconsequence of the jury, in spite of the innocent victims that are bound to be made in the working of any human system, still, remembering its many benefits,

let us not speak evil of the law. Let us purge it of its defects. Let us fill in its blanks. Let us force observance of it. Above all let us respect it ourselves, remembering that the law of a people has something of the sublime, since it is the resultant of centuries of striving on the part of that people to follow the shortest pathway to eminent justice.

THE DECLARATION OF LONDON.

At the present Imperial Conference the delegates from the overseas Dominions have been invited to state the views of the countries they represent upon the expediency of Great Britain adopting, by statute, the principles of International Law embodied in the Declaration of London. Little attention has been paid to this very important matter in Canada, although it has been characterised by a leading publicist as "one of the most important instruments in the history of International Law." In the House of Commons, when the matter was incidentally raised in supply, the leading men of both parties seemed to treat it as of no great moment. Australia, however, has not been so indifferent to the bearing of the Declaration upon colonial interests, having formally expressed her regret that "the Dominions were not consulted" prior to the signing of the Declaration. The Imperial authorities, it appears, had proceeded to a further stage in ignoring the opinion of the Dominions, a bill having been introduced into the British Parliament for the purpose of giving statutory effect to the provisions of the Declaration; but tardy thought was taken that possibly the colonies ought to be heard as to the terms of an international arrangement by which they were to be bound, and so debate upon the Bill was suspended until the overseas delegates had an opportunity of voicing their opinions on the provisions of the Declaration at the Imperial Conference.

The Declaration is a very voluminous document, consisting of seventy-one articles and nine chapters; hence no detailed examination of it is at all possible in the course of a single editorial. Suffice it then, to say that the first part deals with blockade; the second with contraband; the third with unneutral service; the fourth with destruction of neutral prizes; the fifth with the transfer of a neutral flag; the

sixth with enemy character; the seventh with convoy; the eighth with resistance to search; the ninth with compensation. The Declaration, in short, contains a body of law which the proposed International Prize Court will administer in respect of the divers subjects above set out. When it is recognised that the commerce of this country in time of war will be affected by this international arrangement, the importance of it to us cannot be overestimated.

So far as we have been able to master the provisions of the Declaration in question, we think many of them are of a character to which very little objection can be found on the part of Canada; but it is nevertheless desirable that the Imperial authorities should understand that our consent and concurrence in such matters ought to be obtained before negotiations are entered into with foreign powers to give them the force of compact or law. The present Imperial Conference would, therefore, seem to be the psychological moment for such an understanding to be arrived at. We feel supported in this opinion by the language of the TIMES in a recent editorial on "An Imperial Foreign Policy." Having pointed out the necessary absorption of the colonies in purely domestic concerns during their adolescent stage, the writer proceeds to say: "That state of affairs is plainly coming to an end in these days—coming to an end more rapidly than the most far-seeing of political prophets would have ventured to predict a few years back. The Dominions have already reached the stage at which circumstances compel them to look beyond their borders With the accomplishment of South African Union the last of them has definitely achieved the status of a nation, and their self-respect as nations is leading them, in one form or another, to undertake a growing share of the burden of defending their borders. Simultaneously the problems of their population are becoming more acute, they are acquiring commercial and industrial interests which are not identical, and in some cases actually conflict, with those of these Islands; they are being driven at a dozen points into practical world-politics on their own account . . . . The broad fact remains that there is no real security that any Imperial problem, whether of population or defence or commerce, can be handled safely and satisfactorily so long as there is no mutual understanding of the obligations of the five British nations to one another and to the Empire as a whole. It has become impossible

under modern conditions to continue a system, or want of system, in which foreign policy remains a sealed book to all but one of the five partners."

Let us agree, then, that the time has arrived for the fullest conference and agreement between the "five British nations" (to quote the TIMES), in the conduct of all international matters affecting the Empire at large.

In our opinion there is no subject dealt with by the Declaration of London which more vitally concerns Canada than that of "Contraband." In respect of this matter it is to be observed that two distinct doctrines have been maintained by modern jurists. On the one hand, exponents of what is called the 'Continental' doctrine maintain that only articles exclusively used in war are contraband. This is often termed by writers, the doctrine of 'Absolute Contraband.' On the other hand, what is known as the 'Anglo-American' doctrine recognises not only absolute contraband, but conditional, or accidental contraband, i.e., goods which, though not exclusively used for purposes of war, may be so used. This doctrine was very clearly expressed by the Supreme Court of the United States in the case of the *Peterhoff* (5 Wall. 58). There the Court said: "The classification of goods as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is, perhaps, impracticable, but that which is best supported by American and English decisions may be said to divide all merchandise into three classes: (1) Articles manufactured and primarily or ordinarily used for military purposes in time of war; (2) Articles which may be, and are, used for purposes of war or peace, according to circumstances; (3) Articles exclusively used for peaceful purposes. Merchandise of the first-class, destined to a belligerent country, or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second-class is contraband only when destined to the military or naval use of a belligerent; while merchandise of the third-class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege."

The provisions of the Declaration steer a middle course between these two doctrines. A distinction is made between absolute and conditional contraband; and a long list (susceptible of addition on notice) is given of articles which are hereafter to be treated as absolute contraband

without notice. As to additions to that list, it is provided that they shall not bind other powers; that they must be articles exclusively used for war; and that there shall be an appeal to the International Prize Court, if any wholly unjustifiable additions are made. While this is a step in the direction of certainty as to the law of absolute contraband, the criticism has been made that the list would have been more satisfactory if it were not susceptible of addition except by agreement of the parties.

Taking up Article 24 of chapter 2 of the Declaration, we observe that it has an important bearing on the commercial interests of Canada, inasmuch as in its enumeration of articles which are "susceptible of use in war," as well as adapted for the purposes of peace (and which may without notice be treated as conditional contraband), are included "food-stuffs, forage and grain suitable for feeding animals, railway materials," &c. These goods, under the provisions of Art. 33 of Chapter 2, are liable to capture if they are "destined for the use of the armed forces of a Government Department of the enemy State, unless in this latter case the circumstances shew that the goods cannot in fact be used for the purposes of the war in progress." The terms in which this provision is couched are peculiar to say the least, and their interpretation is not helped by Art. 34, which declares that a *hostile destination may be presumed* "if the goods are consigned (a) to enemy authorities, or (b) to a contractor established in the enemy country, who, as a matter of common knowledge, supplies articles of this kind to the enemy, (c) to a fortified place, (d) or other place serving as a base for the armed forces of the enemy." Taking the item of 'food-stuffs' alone, can it be said that the provisions of the Declaration afford as much protection to neutral goods as the present international practice ensures? We think not. In the first place, the Declaration excludes the application of the doctrine of "continuous voyage" to conditional contraband (Art. 35). By this doctrine the ultimate destination of a cargo is held to determine its liability to capture. If such destination is a neutral port, and if the cargo is intended to be sold there, and taken up as a part of the general stock in trade, the cargo is not liable to condemnation. (See the *Jonge Margaretta*, 1 C. Rob. 189; the *Polly*, 2. C. Rob. 369; the *William*, 5 C. Rob. 395. the *Baltic*, 1 Acton 25; the

Flora, 6 C. Rob. 9). Lord Stowell said in the *Jonge Margaretta* (*supra*), that "the nature and quality of the port to which the articles were going is not an irrational test. " . . . . If the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ship of war may be constructed at that port." Instead of Lord Stowell's clear and objective test—the ultimate destination of the cargo as evidenced by the ship's papers—the Declaration sets up a violent presumption of hostile destination upon a state of facts quite compatible with an intention to comply with the obligations of neutrality.

So much for the doctrine of 'continuous voyage.' Furthermore, it will be observed that Art. 34 raises the presumption of contraband "if the goods are consigned to enemy authorities." This would, of course, include a consignment to any civil department of the belligerent State; indeed, this is made abundantly clear by the commentary upon Art. 34 in the General Report appended to the Declaration. The commentary proceeds as follows: "The State is one, though it necessarily acts through different departments. If a civil department may freely receive food-stuffs or money, that department is not the only gainer, but the entire State. including its military administration, gains also, since the general resources of the State are thereby increased. Further, the receipts of a civil department may be considered as of greater use to the military administration, and so be directly assigned to the latter. Money or food-stuffs really destined for a civil department may thus come to be used directly for the needs of the army. This possibility, which is always present, shews why destination for the department of the State is assimilated to that for its armed forces." Now, this argument would brand as contraband food-stuffs supplied to a civil department of a belligerent State solely for the purpose of relief to the civil population in respect of distress not only not occasioned by the war, but due to causes wholly distinct from it, such as a natural failure of crops. Such a reactionary step in international practice, has only to be mentioned in order to be deprecated. It is all the more amazing when we recall that Great Britain made the following protest against an attempted extension of contraband by the Russian Government some few years ago: (Lord Lansdowne to Sir C. Hardinge, January 1st, 1904) "His

Majesty's Government could not, however, admit that, if such provisions were consigned to the port of a belligerent (even though it should be a port of naval equipment), they should therefore be necessarily regarded as contraband of war. In the view of His Majesty's Government, the test appears to be whether there are circumstances relating to any particular cargo to shew that it is destined for military or naval use."

We are free to say that our reading of the Declaration of London has convinced us that beyond the provisions relating to conditional contraband here oppugned, there is very little in it to incur the disapproval of the Canadian people. But we think that enough has been elicited in the examination of this particular subject to justify what we have above suggested and shall hereafter persistently advocate, namely, that whenever the British Government undertakes to make international arrangements affecting the interests of the Empire as a whole, the consent of the Dominions thereto must be first sought and obtained.

GOVERNMENT BY COMMISSION.

In that mine of worldly wisdom, Selden's Table Talk, there is the following parable:—

"Lady Kent articled with Sir Edward Herbert that he should come to her when she sent for him, and stay with her as long as she would have him: to which he set his hand: then he articled with her, that he should go away when he pleased, and stay away as long as he pleased, to which she set her hand. This is the epitome, says Selden, of all the contract in the world betwixt man and man, between prince and subject; they keep them as long as they like them, and no longer."

This is as true as ever it was; and if any contracting party think that by some new device of strength he can make the bonds of contract unbreakable, he will speedily be met by a sufficient retort. There you have the whole story of government by Commission. In considering the novel machinery that is now being so plentifully provided to deal in an entirely exceptional manner with a certain class of human arrangements, it is beside the point to look for some

fundamental reason for setting apart one sort of the world's producers from another. We need make no elaborate distinction between public utilities and other commodities; beating the moral drum in the manner of a distinguished gentleman to the south. A certain kind of producer has a concentrated clientele. As the clientele grows, the producer becomes stronger—so strong that the consumer's freedom to keep a contract no longer than he likes it, appears to be menaced. The clientele, having a greater voting power than the producer, invents the Commission with the object of restoring the former balance. Whether this object is attained in the long run by those who desire it, and whether, if their freedom be protected, the freedom of the producer is not over-looked, are points that have yet to be considered.

In the meantime, we have, on this continent, railway and transport commissions, water commissions, telephone and telegraph commissions, gas and electric lighting commissions, inter-state commerce commissions, and public utilities commissions of all sorts; all of them with the avowed object of interfering in contracts.

It may be interesting to consider one or two constitutional points with regard to such commissions in general, and the more particularly certain questions connected with the latest of them and the nearest to ourselves.

These bodies are hard to define. They are amphibious—half legislature, half Court. In the first of these qualities how far are they constitutionally sound. Does the fact that they are created by legislatures purge them of every taint of the unconstitutionality usually to be suspected where unique machinery is substituted for the normal and healthy law of the land? Can there be any unconstitutionality with us, particularly in this province when the legislature is acting within the confines of its part of the British North America Act?

In Canada, of course, we are in a somewhat different position from that of the United States, where, by Article 1, of the Constitution, sub-section 10, laws impairing the obligation of contracts are forbidden. Article 5, of the Amendment to the Constitution reads partly thus:—

"No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without justification."

Article 14, Section 1, of the Amendment reads:—

". . . . nor shall any State deprive any person of life, liberty or property without due process of law."

Under such principles, the Courts of the United States will interfere with commissions when their acts amount to such flagrant attacks upon the rights of property, under the guise of regulations, as to compel the Court to say that just compensation is being denied for private property taken for public use. The authorities in this connection were considered in the case of the *Mayor and Aldermen of the City of Knoxville* v. *The Knoxville Water Co.*, 1909, where Mr. Justice Moodie of the Supreme Court of the United States, after discussing them, gave this warning:—

"Regulation of public service corporations which perform their duties under conditions of necessary monopoly will occur with greater and greater frequency as time goes on. It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated. The Courts ought not to bear the whole burden of saving property from confiscation, though they will not be found wanting where the proof is clear. Legislatures and subordinate bodies to whom the legislative power has been delegated, ought to do their part. Our social system rests largely upon the sanctity of private property, and that State or community which seeks to invade it, will soon discover the error in the disaster which follows. The slight gain to the consumer, which he would obtain from a reduction in the rates charged by public service corporations, is as nothing compared with his share in the ruin which would be brought about by denying to private property its just reward, thus unsettling values and destroying confidence."

The fact, however, that such a warning was given, shews that the seemingly precise terms of the American Constitution are capable of being interpreted very elastically. In 1876 it was said in the case of *Munn* v. *Illinois* (94 U.S. 113), that

"One who devotes his property to a use in which the public has an interest . . . in effect grants to the public an interest in that use. and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by

discontinuing the use, but so long as he maintains the use, he must submit to the control."

A dictum such as this, if one carefully considers it, would cover almost any public interference with private property. This was recognised a few years later, when it was declared in one of the inter-state railroad commission cases (116 U.S. 307, 1886) that

"It is not to be inferred that this power limitation or regulation is itself without limit. The power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation."

But where and by what rule the limit is to be drawn beyond which regulation amounts to a denial of the equal protection of the law, or to a taking of property without due process.— it seems impossible to say. This was pointed out in the leading case of *Smyth* v. *Ames,* 169 U.S. (1898), 466, at p. 522; and again in *Buell* v. *Chicago, Milwaukee & St. Paul Railway Co.* (1907), where the Railroad Commission of Wisconsin said:

"The Supreme Court of the United States has not yet given us the benefit of any definite working rule by which we may determine when a rate is confiscatory, and therefore, unconstitutional, and when it is not. From reading the decisions, we can arrive at any of the following conclusions as to when a rate is or is not unlawful, depending upon the decision to which we pin our faith.

"(1) A rate is unlawful unless it enables a carrier to earn its operating expenses and a fair amount of return on its investment.

"(2) A rate is unlawful if it does not permit the earning of operating expenses and some income on the investment, but not necessarily what would be a fair or reasonable income.

"(3) A rate is not unlawful in some instances at least, if it admits of the carrier earning simply its operating expenses without additional revenue."

This is going a long way; and while the same commission in 1906 seemed to reject the third of the foregoing conclusions, yet it cited with approval the case of *Covington & Lexington Turnpike Road Co.* v. *Sandford* (1896), 164 U.S. 578, 596 as follows:—

"It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. . . . The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The Legislature has the authority, in every case where its power has not been restricted by contract, to proceed upon the grounds that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway, established and maintained under legislative authority. If a corporation cannot maintain such a highway, and earn dividends for stockholders, it is a misfortune for it and one which the constitution does not require to be remedied by imposing unjust burdens upon the public."

This is carrying to amazing lengths the doctrine that no man liveth unto himself. While it may be selfish and even stupid of stockholders to expect to earn dividends rather than to contract to carry and to light the public for charity, to give it free heat, free drink, and soon perhaps, free food; one does not find it hard to agree that if a company is to be forced to continue its undertaking, and yet to abandon the sole purpose of its existence, from the company's point of view, it is, indeed, a misfortune.

With ourselves, the doctrine seems to have been developing of late that the legislature is the sole depository of the Constitution; and that the British North America Act simply parcelled out between certain legislative bodies for all time the entire management of our liberties. We are now becoming quite used to the assertion that Parliament can do anything. It is over half a century since that great constitutional critic, "Punch," wrote:—

> "Sleep, Mr. Speaker, sleep while you may;
> "Sleep, Mr. Speaker, Cobbett will soon
> "Move to abolish the sun and the moon."

You will observe that there was even at that time a note of protest at such omnipotence. There appears to be none in these more enlightened days.

The whole history of this subject has been very thoroughly considered in the two recent Ontario cases of *Smith* v. *The City of London,* and *Beardmore* v. *The City of Toronto.* The first is reported in 20 O. L. R. 133; the second in the same volume, p. 505. These two cases have both been

decided upon the same grounds, and have passed through the Courts of Ontario with an unanimous expression in favour of the doctrine of the supremacy of Parliament. Mr. Justice Riddell, in the first of the two cases, made a full examination of the authorities.

After citing a former Chief Justice of England, Sir John Holt, who, in the year 1700, declared that an Act of Parliament can do no wrong, though it may do several things that look pretty odd, Judge Riddell says:

"Sir Edward Coke, who advanced the proposition in Bonham's case, 8 Co. 118 (a) that 'the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void,' was properly rebuked by Lord Ellesmere (see note in Thomas & Fraser's edition of Co. Rep. vol. 4, pp. 376, 377)."

He continues:—

"There is consequently nothing more than the veriest legal commonplace in the description given of the powers of the legislature in the case of the *Florence Mining Co.* v. *The Cobalt Lake Mining Co.* (1908), 18 O. L. R. 275, at p. 279; in short, the legislature, within its jurisdiction, can do everything that is not naturally impossible, and is restrained by no rule, human or divine."

Our Court of Appeal, as everyone knows, affirmed this principle in the recent case of *The Travellers Insurance Co.* v. *The Travellers Life Assurance Co. of Canada.*

And yet, it is doubtful whether the point may not be further considered. Owing to its nature, this phase of the Travellers case could not be taken to appeal, and in it, moreover, the issue could not be presented as neatly as is desirable. In that case too, it may be well to remember that the Court divided 3 to 2, and the Chief Justice of the Court declared:—

"It is an error to claim that the Parliament of Canada is omnipotent. There is no omnipotent authority in the world. . . . There is no authority in the country which does not come within the scope of the Courts. The protection afforded by the Courts is the most efficient protection against every form of tyranny."

Such a declaration cannot be brushed aside. You may have Democracy without a Parliament, and tyranny with one and through one. Government, after all, is a compromise between force and tact; a compromise in the mutual

relations of those three representatives of the people — the legislature, the executive and the judiciary. At each stage in constitutional history all of them are forms and means of expressions; none of them are substance. A wise people will not be led aside by cant to let any one of the three arrogate alone the position of guardian of the public good; and it is quite possible to believe that for the last 100 years we have overdone our reliance upon the caprice of statutes, as against the steadfastness of common law.

The three foregoing cases have been referred to in the April number of the *University Magazine*, apropos of some flagrant instances of confiscatory legislation in Canada. The edition of that magazine has presented much food for thought to all who are concerned in the tendencies of the time; and has suggested that the last word has not yet by any means been said upon the powers of legislatures.

In support of that position, with more particular bearing on the subject before us, reference might be made to a book, published over 60 years ago by a staunch English Liberal, who cites some very apposite authorities, and attempts to rouse attention to the fundamental character of the principles involved. The argument is, in places, perhaps somewhat extreme, but in a world where we have all to become broadminded to the point of dullness, and tediously careful to avoid the vulgarity of decided opinions, a treatise of this sort is exhilarating. It is entitled "Government by Commissions, Illegal and Pernicious." The author reminds us at the beginning, of such assertions, for example, as these:—

"Magna Carta is such a fellow that he will have no sovereign."

This is from Lord Coke, who also says that Magna Carta is—

"not only a statute but also a declaration of the common law—which is right reason, which is above Acts, and the law and rule to make Acts by."

He considers an infringement of it as a plucking up of the

"Fundamental law of England by the very roots."

Lord Brougham declares that those who infringe the Great Charter are:—

"Plainly violating a known, established and fundamental law of the land."

An essayist on the English Constitution in 1771, says this:—

"There is not a more dangerous doctrine which could be adopted, in our state, than to admit that the legislative authority has any right to alter the first principles of our Constitution by Acts of Parliament. . . .

"Our legislative authority is by its own nature, confined to act within the line of the Constitution and not break through it; because the House of Commons is only vested with a trust by the people, to the end that they may protect and defend them in their rights and privileges. And therefore it is a contradiction in terms to say they have a right to consent to a law that may restrain or destroy them. I think it is as plain as any proposition in euclid, that the House of Commons could not consent to such a law, without a notorious violation of the trust reposed in them."

He then goes on to shew that the consistent development, from Magna Carta upwards, of the doctrine that the right of property ought not to be dealt with except by the common law of the land, and that no class of contracts should be set apart and subjected to any authorities and regulations other than those of the country as a whole.

We are not so familiar with these historic assertions of our constitutional liberty that they will not bear repetition. Here is chapter 43 of Magna Carta:—

"No freeman shall be taken, or imprisoned, or disseised or outlawed, or banished, or any ways destroyed (that is to say, attacked in property or person), nor will we pass against him, nor send against him, unless by lawful judgment of his peers or by the law of the land."

Chapter 44:—

"We will sell to no man, we will not deny or delay to any man, right or justice."

25 Edw. III.: Statute 5, ch. 4, re-asserts these principles as follows:—

"Whereas it is contained in the Great Charter of the franchises of England that none shall be imprisoned nor put out of his freehold, nor of his franchise, nor free custom, unless it be by the law of the land; it is accorded, assented and established that from henceforth none shall be taken by petition, or suggestions made to our Lord the King, or to his council, unless it be by indictment or presentment by good and lawful people of the same neighbourhood where

such deed shall be done, in due manner, or by process made by writ original at the common law; nor that none be ousted of his franchises, nor of his freehold, unless he be duly brought to answer and forejudged of the same by the course of the law; and if anything be done against the same, it shall be redressed and holden for none."

In the 28th year of the same reign, we have it repeated:

"No man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death without being brought to answer by due process of law."

The petition of right brings us still nearer the matter in hand. It declares:—

"Whereas also by the statute called the Great Charter of the Liberties of England, it is declared and enacted that no freeman may be taken or imprisoned, or be disseised of his freehold or liberties or his free custom, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers or by the law of the land. And in the eighth and twentieth year of the reign of King Edward the Third, it was declared and enacted by authority of Parliament that no man of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law"

"Therefore," this statute declares, after reciting certain notorious infringements of these provisions by certain Crown appointees under the Great Seal, such—

"Commissions and all others of like nature are wholly and directly contrary to the said laws and statutes of this your realm;"

and it continues,

"No commission of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesty's subjects be destroyed or put to death, contrary to the laws and franchises of the land."

In the Act to abolish Star Chamber, 16 Car. 1, ch. 10, which was held to be,

"an intolerable burden to the subjects, and the means to introduce an arbitrary power and Government,"

it was ordained,

"that from thenceforth, no Court, council, or place of judicature shall be erected, ordained, constituted or appointed within this realm of England or Dominion of Wales, which shall have, use, or exercise the same or the like jurisdiction as is or has been used, practised or exercised in the said Court of Star Chamber."

and it was declared,

"that neither his Majesty nor his Privy Council have or ought to have any jurisdiction, power or authority by English bill, petition, article, libel, or any other arbitrary way whatsoever, to examine or draw into question, determine or dispose of the lands, tenements, hereditaments, goods or chattels or any of the subjects of this kingdom, but that the same ought to be tried and determined in the ordinary course of justice, and by the ordinary Courts of the law."

In the same year, the Court of High Commission was abolished, upon a declaration substantially the same, that,

"no new Court shall be erected, ordained or appointed within this realm of England or Dominion of Wales, which shall or may have the like power, jurisdiction or authority as the said High Commission Court now hath or pretendeth to have."

Still stronger is the Bill of Rights itself, which declared

"that among the undoubted rights and liberties of the people to be claimed, demanded and insisted on, was this:—

"that the commission for erecting the late Court of commissioners for ecclesiastical causes, and all commissions and Courts of like nature, are illegal and pernicious."

It may, perhaps, be said, that all these assertions apply only to commissions appointed by the Crown or the Cabinet, and not to those authorised by Act of Parliament itself. But such is not really the spirit of these constitutional enactments. Leave alone the maxim *delegata potestas non potest delegari;* leave aside the fact that even where Parliament creates, it is the Crown, and not Parliament, that appoints; yet surely the spirit of all these declarations is that it is unsound to deal with the rights and properties of any citizens or subjects by any means except the ordinary process of the ordinary laws."

Dicey, on p. 183 of his "Law of Constitution" has this paragraph:—

"When we say that the supremacy of the rule of the law is a characteristic of the English Constitution . . . we

mean, in the first place, that no man is punishable, nor can he be made to suffer in body or goods, except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every other system of Government based on the exercise by persons in authority of wide arbitrary or discretionary powers of constraint."

In the case of *Smith* v. *City of London* already referred to on p. 141 of the report, Mr. Justice Riddell takes up this aspect of the matter.

"It is contended," he says, 'that to deny the right of this plaintiff to have his claim passed upon by the King's Court is a breach of Magna Carta. Whatever Magna Carta may be in law, whether a treaty between King and subjects, charter and grant by the King, declaration of rights, constitution, statute or what not, it is also a long and miscellaneous code of laws . . . the first great public Act of the nation after it had realised its identity. But it is equally true that much of Magna Carta is obsolete, and that the Imperial Parliament has not hesitated, whenever occasion called for it, to legislate away its provisions."

He refers for example, to chapters 11, 18, and 27; and goes on,

"I hesitate to speak of chapter 42: 'We will appoint as justices, sheriffs or bailiffs, only such as know the law of the realm, and mean to observe it well.' The celebrated chapter 40, '*Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam*'—To none will we sell, to none will we deny or delay right or justice; much misunderstood as it has been, beyond any question contains the cardinal principle that all are entitled to the enforcement, and the prompt enforcement of their legal rights. Any interference with the full performance of the promises of this chapter will be jealously guarded by the country; but even this is subject to the will of the legislature in the Mother Country and here. It is needless to give further instances of the power of the Imperial Parliament to nullify provisions of Magna Charta. I shall mention cases in Canada. In *Ex parte Gould* (1854), 2 Mathieu Rev. Rep. 376, 378, Mr. Justice Day says: 'Almost every statute interferes . . . with vested rights. . . The powers of legislation of the Provincial Parliament are extensive as those of the Imperial Parliament, while they

keep within the limits fixed by that statute, even if they were to interfere with Magna Carta.'"

It is to be remarked that the chapters of the Great Charter referred to by Mr. Justice Riddell as repealed were of no constitutional importance whatever. But his opinion remains, and in the face of such contradictory points of view, what are we to say? Does not the whole matter resolve itself into this simple question—if Parliament and the Judiciary came to a challenge not—which in itself would be the stronger—but to which would the people give their support? Surely the answer is that the victory would be won before the encounter by that body of the two which knew better how far it could afford to go in asserting its particular conception of political freedom. This is so true that we do not for a moment need to contemplate, save for the amusement of it, such a revolutionary nightmare as that suggested. In the ordinary nature of events such questions are settled, not by rhetoric, nor by assertions of the absolute, the impossible, the omnipotent, but by the cool game of give and take, in which each of the players knows that to avoid the final test of one's limitations is the sole omnipotence attainable on earth.

These are the principles involved when commissions are considered in their administrative and executive capacity. Such considerations may, perhaps, be modified in so far as it can be argued that these bodies are really Courts, or are, in the last resort, subject to the supervision of the ordinary Courts of the land, in accordance with the principles of the ordinary law.

Most, if not all of the commissions that have lately been created in this country and in the United States, have the judicial element. The statute referring to the Wisconsin Gas & Electric Light Commission, for instance, speaks of "an investigation, hearing or trial, had under the provisions of of this Act," and of "all necessary actions or proceedings."

The New York Public Service Commission is also referred to in the terms in which we refer to a Court.

If we look at the provisions respecting the Quebec Public Utilities Commission R. S. Q. 718 and following, we find that by 719 it is declared to be a Court of Record. Its sitting is declared to be the hearing of a case, and the matters that come before it are described as contestations. It may consider questions of law, it has rules of practice; it may

summon witnesses, and the summons is to be served in the same manner as in the Superior Court. It may issue commissions to take evidence in a foreign country. The bailiffs of the Superior Court are, *ex officio,* bailiffs of the commission. It has the power of punishment for contempt of Court, and any other means necessary for the proper exercise of its jurisdiction. It has all such powers, rights and privileges as are vested in a Superior Court. Its decision on any question within its jurisdiction is to be *res judicata.*

In so far as those provisions are typical, bodies such as this are assimilated to courts. If the process of assimilation were carried sufficiently far, the constitutional objections that have been already considered, might be dropped. The trouble is that these bodies do more than try issues. They create the issues to be tried, and the rules by which they shall be tried are entirely arbitrary, discretionary and exceptional. It is impossible not to recognise that neither one of the two characters of these bodies, judicial or executory, can be made complete without necessarily interfering with the other.

Dealing, however, with these bodies as Courts, only, interesting points arise that can be best looked at in connection with the Quebec Public Utilities Commission. Supposing this body to be a Court is it a Court of superior or of inferior jurisdiction, and in either case, what follows?

The first point that will naturally occur to one is, that the worst service he could do to the jurisdiction of the body is to suppose it to be a Court of superior jurisdiction, since such a Court could not be appointed by a provincial legislature, or if appointed, would necessarily be an illegal creation.

Our own tribunals have dealt with this question, as may be seen by the case of *Pacaud* v. *Beique,* 21 R. L. 452 (1891), where a commission of the legislature was appointed to inquire into certain charges against a member of the Assembly. It was therein declared that Article 598 of the Revised Statutes was unconstitutional and of no effect in so far as it gave commissioners the same power to compel witnesses to give evidence, as is vested in Courts of law in civil cases. The judgment based itself on the consideration that "since the provincial legislature has no power to provide for the appointment of Judges to Courts of superior or extended jurisdiction, it has no power either to confer the jurisdiction of a superior Court or the powers of a Judge

thereof, on any officers appointed by the Provincial Government, or on any person to be named by it."

Yet it seems to be the plain intention of our legislature to make the Public Utilities Commission a superior Court as far as possible. Appeals from it are to be made to the Court of King's Bench, appeal side, in conformity with Article 47 of the Code of Civil Procedure, from any final decision of the commission upon any question as to its jurisdiction, or upon any question of law: thus putting the body on an equality with the Superior Court. In so far as the legislature of the province has fulfilled its apparent purpose, it would appear to have put the board into a very precarious position.

If, on the other hand, the commission is a Court of inferior jurisdiction, its arrangements would seem to be subject to a much larger revision than that contemplated by the Act creating it. Article 1307 of the Code of Procedure does not, and perhaps could not, contain any restriction with regard to the inferior Courts to which the writ of *certiorari* may be applied, and would, therefore, subject the decisions of the commission to the scrutiny of the Superior Courts, for any reason upon which that writ may be invoked.

Even if it were not arguable that the Public Utilities Commission is a Court, and must, in so far as it is so, be a Court of inferior jurisdiction, there are plenty of decisions in our reports, which, without that reasoning, would reach the same conclusion. Prohibitions have been granted against license commissions, against committees of inquiry, against royal commissions, against the council of the bar, against the chamber of notaries; although in this last case, on grounds of facts, the judgment of the first Court was reversed in appeal. In all these cases, there could be no reason for the issuing of the writ, save that the body attacked came under the category of a Court of inferior jurisdiction The latest case of a similar nature is that the *United Shoe Machinery Co., Petitioner,* v. *The Hon. Charles Laurendeau, Respondent, and Napoleon Drouin, Mis-en-cause;* in which a writ of prohibition was recently allowed to issue by Mr. Justice Bruneau against the board appointed under 9 and 10 Edw. VII., ch. 9, to deal on behalf of the Government with an alleged case of illegal restraint of trade.

In so far as the Quebec Public Utilities Commission is concerned—its learned Chief is of the opinion that the

body over which he so ably presides is not a Court of either kind. In a recent address delivered in Toronto, Mr. Hibbard says:—

"In the first place, this commission is not a Court—it is not a Court of Justice. It is not rigidly bound by those more or less necessary rules of procedure, in the conduct of cases, that govern Courts, because it is not essentially a place or body to which contending interests must be brought for final adjustment. . . .

"I am firmly convinced," he says, "that the purpose of the commission could not be fulfilled if it were in any real sense a Court of Justice."

Later, the learned gentleman adds:—

"The same provision prevails in your law, I mean the law governing the Ontario Railway and Municipal Board, as governs my own commission of the Railway Board at Ottawa. When they have given a decision concerning a question of law there is an appeal to your Court of Appeal in Ontario and our Court of Appeal in Quebec, or the Supreme Court at Ottawa in the case of the Railway Board. That appeal is undoubtedly very necessary and a very proper safeguard. But of late I saw a delegation representing public utilities going down to Quebec, and asking that the right of appeal might be given from a decision of the commission of which I am a member upon a question of fact. Now I want to say that I consider that the moment that you give an appeal of that nature you have converted your commission, from the body which I have endeavoured to define, but which I think it necessarily must be, into a mere Court of Justice. I say a mere Court of Justice, because the powers of procedure in a Court of Justice must be limited, and, having converted your commissions into Courts of Justice, why, 75 per cent. of their very *raison d'etre* will have disappeared because then they must proceed to gather the material—I mean matter upon which they have to base their findings and decisions—in a precise, accurate and legal form which can be submitted to a Court of Appeal."

Here again it is borne in upon us that insensibly the matter steps from the regions of law into those of political fact and belief. If efficiency in executive control be the highest good of a state, then undoubtedly it is stupid to maintain that the executory body is or should be a Court of law. But if liberty be more important than good manage-

ment, if the wisest discretion of a few persons directing the community be really less beneficial in the long run than the universal use by all and for all of the same well known principles, whatever be the consequence; then it becomes of the utmost importance to insist upon the assimilation to Courts of the public bodies we are examining, and upon their adherence or subjection to the ordinary laws of the land.

In addition to these points arising with regard to the constitutionality and character of the Quebec Public Utilities Commission, there is another that may be worth a glance from the narrower constitutional standpoint of the British North America Act. Is a commission of this kind, a body created to regulate trade and commerce? In so far as we may follow the second of the two Ontario cases already referred to, as well as the *Citizens Insurance Co.* v. *Parsons,* 7 A. C., 1906, p. 110, the words "regulation of trade and commerce," as used in section 91, sub-section 2, of the British North America Act, include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of interprovincial concern and, it may be, general regulation of trade affecting the whole Dominion; but do not include the regulation of the contracts of a particular business or trade—and thus do not conflict with the power over property and civil rights conferred by sec. 92, No. 13.

While, in the Parsons case, their lordships of the Privy Council were careful to say that they abstained from any attempt to define the limits of the Dominion Parliament in this direction, and while the point was not what the province, but what the Dominion, might not do under the section quoted, yet it does not seem that the question of the relative constitutionality of the Quebec Public Utilities Commission could be raised under clause 2 of section 91, of the Act of Confederation.

Yes, whatever is the legal interpretation of the phrase "regulation of trade and commerce," there can be no doubt that from the economic point of view, it applies to the activities of the commission. It applies to the similar activities of all similar bodies; and again we are brought to the political issue, as distinct from, or rather as dominating, the legal. No such Boards can sit without modifying rights of property, rights of contract and freedom of trade. They will necessarily restrict not only the monopolies with which

they deal, but also the public; for it must not be forgotten that when they prescribe forms of contract and rates of payment, they confirm all the stipulations that they do not reject, and bind consumers on points that might otherwise be debatable.

These commissions have been created to maintain the liberty to keep a contract no longer than one likes it. Is it not possible that in replacing, by the will of an outside power, the wills of the contracting parties, they may be found to have an effect quite contrary to that designed? How long, then, will they themselves be liked? The human comedy busies itself in these days over endless attempts to escape from the strict but even sobriety of the law. Perhaps the law is secure enough, and sufficiently fundamental, to await serenely the return of the prodigals.

Montreal. W. F. CHIPMAN.

CORROBORATION OF THE EVIDENCE OF AN ACCOMPLICE.

Cases in which considerations arise as to the evidence of an accomplice are constantly occurring. They are often of considerable importance, and present some difficulties. On the one hand, the desire to bring to justice a person against whom there exists strong suspicion of guilt of a crime is necessary and most right and proper, while, on the other hand, equally just is the principle that a man should not be lightly deprived of his liberty where the main evidence is that of a participator or participators in the crime unless there is some independent trustworthy evidence substantiating to some degree the tainted evidence. The difficulties arise with regard to the nature and extent of the corroboration required, and to the duty of the Judge or presiding chairman at the trial to direct the jury.

Since the establishment of the Court of Criminal Appeal some dozen cases have been before the Court which have involved consideration of these points, and as the result of the decisions of the Court is far from being as clear as is desirable, some discussion of the matter is, perhaps, not out of place. It is necessary to a right understanding of the

subject to see, first of all, how the matter stood before the Criminal Appeal Act came into force.

From very early times an accomplice has been a competent witness upon whose evidence alone, without any confirmation by another witness or other evidence, the jury were entitled to convict an accused person: 1 Hale (1672) 303, 304, 305. But the danger of founding a conviction upon such tainted materials was soon recognised, and it became a rule of practice for Judges to caution the jury that, unless the evidence was in fact supported to some extent by other independent testimony, it was unsafe to act upon it at all: *R.* v. *Jones* (1809, 2 Camp. 131), per Lord Ellenborough. Opinions differed as to the exact nature and extent of the corroboration required, but the cases, on the whole, reveal a tendency towards a stricter practice. At first all that was necessary was confirmation of some of the particulars or circumstances deposed to by the accomplice, and if that was forthcoming by means of independent evidence it was enough to make the whole story sufficiently reliable for the jury, if they chose, to act upon it, though there was no confirmation bearing directly upon the guilt of the person accused: *R.* v. *Atwood* (1787, 1 Leach 464), *R.* v. *Birkett* (1813, R. & R. 251), *R.* v. *Dawber* (1821, 2 Camp. 133).

The next step was to realise the insufficiency of this kind of confirmation. As early as 1787, we find doubt expressed as to whether the corroboration of the accomplice by the prosecutor of all the circumstances that passed when the offence (robbery) was committed upon the latter except as to the persons committing the crime was sufficient in the absence of "any other evidence that could materially affect the case," but the twelve Judges to whom the doubt was referred answered that the corroboration was sufficient to support the conviction, inasmuch as a conviction founded upon the uncorroborated evidence of an accomplice was quite legal: *R.* v. *Atwood* (*supra*). The doubts, however, increased in intensity. In 1834 it was said that "everyone will give credit to a man who avows himself a principal felon for at least knowing how the felony was committed," and it was held that the mere confirmation by independent evidence of the fact that a ladder was taken away from certain premises as a means of gaining ingress into the warehouse broken into, was no corroboration at all, but that what was wanted was "something that goes to bring the matter home

to the prisoner:" *R.* v. *Webb* (1834, 6 C. & P. 595). So also in another case in the same year it was held that the corroboration ought to be "as to some fact or facts the truth or falsehood of which go to prove or disprove the offence charged against the prisoner," and that corroboration as to collateral facts which did not connect the accomplice and the prisoner together or the prisoner with the crime was insufficient: *R.* v. *Addis* (1834, 6 C. & P. 388). Again, two years later, Baron Alderson says: "The confirmation I always advise juries to require is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged:" *R.* v. *Wilkes* (1839, 7 C. & P. 272). In a case often quoted (*R.* v. *Farler*, 1837, 8 C. & P. 106) the jury were directed that corroboration in some material circumstances affecting the identity of the party accused was the sort of corroboration they should have before acting upon the evidence of the accomplice. There was independent evidence that the accused and the accomplice had been drinking together at a public house the evening the offence was committed; that they had stayed in the house together till closing time and then left together, but in the face of other evidence that the accused lived quite close to, and used, the house, it was suggested by the Judge that the corroboration was too slight to justify a conviction. In another case, a little later, where it was urged that the confirmation need not be as to the party accused, and a case decided in 1836 was quoted in the support of this argument (*R.* v. *Hastings*, 7 C. & P. 152), it was said that "in the majority of recent cases it is laid down that the confirmation should be as to some matter which goes to connect the prisoner with the transaction:" *R.* v. *Dyke* (1838, 8 C. & P. 261). In other cases corroboration as to some of the accused but not as to others was considered, as against the latter, not to be corroboration which made it safe to convict them: *R.* v. *Wells* (1829, M. & M. 326); *R.* v. *Jenkins* (1845, 1 Cox 177).

Long before the Criminal Appeal Act, therefore, the nature of the corroboration which, in the opinion of most Judges, alone rendered it safe, for the jury to act upon the story of the accomplice as a whole was established. Different words were used to express it, but they all practically amounted to the same thing, viz., that the corroboration must be in material circumstances which connected the person

accused with the commission of the offence charged. It was, of course, not necessary that the accomplice should be confirmed as to all the parts of his story by evidence directly implicating the accused, as then the testimony of the accomplice would be unnecessary altogether: see *R.* v. *Mullins* (1848, 3 Cox 526, at p. 531, per Maule, J.).

On the other hand it never became a rule of law that corroboration of this kind was essential to the validity of a conviction. On this point there was no real departure from the decision in *R.* v. *Atwood* (*supra*) see *R.* v. *Mullins* (*supra*). In a late case before the Court for Crown Cases Reserved, the rule is stated thus: "It is not a rule of law that an accomplice must be confirmed in order to render a conviction valid, and it is the duty of the Judge to tell the jury that they may, if they please, act on the unconfirmed testimony of an accomplice. It is a rule of practice, and that only, and it is usual in practice for the Judge to advise the jury not to convict on the testimony of an accomplice alone, and they generally attend to the direction of the Judge and require confirmation: *R.* v. *Stubbs* (1885, Dears. 555 at p. 556 per Jarvis, C.J.). In this case the Court with regret upheld a conviction, leaving it to the Secretary of State to interfere, though there had been no corroboration as regards the accused person on whose behalf the case was stated. This case was approved in *R.* v. *Boyes* (1861, 1 B. & S. 311), and quite recently in an extradition case before a Divisional Court—*Re Meunnier,* 1894, 2 Q. B. 415, at p. 418—Cave, J., said that he knew of no power to withdraw the case from the jury or to set aside a verdict of guilty on the ground that there was no corroboration of the evidence of the accomplice. But the practice of warning the jury was one which, in the words of Lord Abinger, C.B., in *R.* v. *Foster,* deserved "all the reverence of the law," and it sometimes happened that where the Judge considered there was no proper corroboration, and the jury declined to act upon the advice of the Judge to acquit the accused, the Judge peremptorily directed them to return a verdict of not guilty: *R.* v. *Robinson* (1864, 4 F. & F. 43, Pollock, C.B.).

The legislature in the meantime had recognised the wisdom of the common law principle, and in certain offences against women had ordained that corroboration of the wo-

man in some material particular by evidence implicating the accused, was essential to a conviction: Criminal Law Amendment Act, 1885, secs. 2 and 3. Whether the words "corroboration in a material particular by evidence implicating the accused" were meant to be the statutory enunciation of what the legislature regarded as the common law rule with regard to accomplices, is perhaps doubtful, though they fairly sum up the real meaning of the expressions already quoted from the cases cited. The words have generally been understood to go beyond the common law rule, both as to the nature and extent of the corroboration required, and as to the duty of the Judge. On the other hand, it is probable that the statutory enactments have influenced to some extent the later decisions as to the common law doctrine. There are not wanting expressions in some recent judgments, which seem to indicate that there is no real difference between the two, either as to the nature and extent of the corroboration, or as to the duty of the Judge. But the latest cases before the Court of Criminal Appeal throw doubt upon what was considered to be the established rule, and as in other respects the decisions are not easy to reconcile, the cases before that Court call for consideration in detail.

The Court had barely existed a month, when an appeal came before it, in which the only evidence was that of an accomplice, and there had been no direction to the jury, such as was approved in *R.* v. *Stubbs* and *R.* v. *Meunnier* (*supra*), *R.* v. *Tate* (72 J. P. 391). The Court quashed the conviction on the double ground of absence of caution by the Judge, and absence, in the opinion of the Court, of any substantial corroboration. In the judgment the statement of the law by Cave, J., in *R.* v. *Meunnier* (*supra*), was quoted with approval with the exception that, in the opinion of the Lord Chief Justice, it should have been said that there was no power to set aside the verdict of the jury "if the jury had been directed according to the usual practice." The expression of Lord Abinger in *R.* v. *Farler* (*supra*), that the practice of directing the jury in these terms "deserves all the reverence of law," was also quoted with approval.

In the next case, *R. v. Barrett* (1 Cr. App. R. 64), the Judge had again not given a proper direction, but the Court refused to interfere on the ground that there was in fact

ample corroboration of the story of the accomplice some of it being afforded by statements made by the appellant himself. In *R.* v. *Jacobs* (1 Cr. App. R. 215), there had been a proper direction, but the evidence of corroboration of the part taken in the crime by the accused was slight, since it consisted almost entirely of denials by the accused, that he knew the accomplice—a denial proved by independent evidence to be false. There was abundant corroboration of the details of the story apart from the identity of the accused. The Court held that the corroboration was sufficient.

In *R.* v. *Everest* (73 J. P. 268), the nature of the corroborative evidence required was directly in issue The presiding deputy chairman had warned the jury as to the necessity for corroboration, though not quite in the usual terms, and had suggested that certain independent evidence was corroboration, which the jury might consider sufficient to make the evidence of the accomplice reliable. The Court of Appeal, however, held that one part of it was only corroborative of an incident in the story quite consistent with the innocence of the accused, while the other parts were only corroborative of details of the story, which had nothing to do with the accused, and that, therefore, there was no corroboration of the kind required, which was said to be corroboration in material particulars implicating the accused —the very phraseology used in the Criminal Law Amendment Act, 1885. The conviction was quashed on this ground.

This case was followed in another which came before the Court shortly after, and again the same words were used: *R.* v. *Warren* (73 J. P. 359). The presiding chairman had given some direction to the jury as to the need of caution in accepting the evidence of the accomplice, but the conviction was quashed on the ground that there was no sufficient corroboration, and the direction had not been as full as it ought to have been under the circumstances.

These two decisions clearly stated the rule as to the kind of corroboration required. By adopting statutory language the Judges, possibly, in this respect went beyond the rule which obtained before the Criminal Appeal Act. This is the view generally entertained, though it is open to serious question, whether after all, the change has not been one of language only. Some of the terms used in the judgments in

the older cases already quoted, seem to be equally strong, though differently expressed.

It is noteworthy that in a still later case (*R.* v. *Graham,* 74 J. P. 246), where the difference between the kind of corroboration required and the nature of the direction to be given to the jury in trials where the main evidence is clearly that of an accomplice and in trials for offences against women, such as incest or carnal knowledge of girls, where corroboration is not required because the girl or woman is not an accomplice, is pointed out, the rule as to the nature of the corroboration of an accomplice which is required is again stated in the terms of *R.* v. *Everest* and *R.* v. *Warren* (*supra*). In *R. v. Karns* (4 Cr. App R. 8—a difficult case), where the corroboration implicating the accused was extremely slight, the general effect of the judgment is to support the rule as to the nature of the corroboration required established by *R.* v. *Everest,* and in *R.* v. *Mason* (5 Cr. App. R. 171), it was said that confirmatory evidence of some of the details of the story of the accomplice was not corroboration at all, and it was again repeated that what was needed was something to implicate the accused outside the evidence of the accomplice. Two other cases (*R.* v. *Powell,* 3 Cr. App. R. 1; *R.* v. *Lucy,* 4 Cr App. R. 165), do not help much either way since the Court held that there was abundant corroborative evidence which in fact implicated the accused.

There is, therefore, a succession of cases all proclaiming the rule in the same terms, and one would have thought that at least the nature of the corroborative evidence required was established beyond all doubt. But in a case which came before the Court on the 7th February, 1911, which has not yet been reported (*R.* v. *Havard and Lewis*), where two persons had been convicted of inciting to commit a burglary and of receiving, on the evidence of an accomplice, corroborated as to some events directly affecting the accused, and which happened both shortly before and shortly after the actual commission of the principal felony, and which therefore could clearly be said to implicate the accused there occur *dicta,* which tend to throw doubt upon the rule as laid down in the cases cited above. It seems to have been said that at common law it is not necessary that the corroboration should be by independent evidence implicating the accused, whatever might be the statutory rule. If this be the effect of

the judgment, there is no possibility of reconciling it with *R.* v. *Everest,* and the matter is left in uncertainty. But it may be that this is not the real effect of the judgment; that these expressions, if used, were only obiter, and at all events, the cases are clearly distinguishable.

In a still more recent case which came before the Court on March 6th, *R.* v. *Benjamin Brown* (No. 2), it was said that the rule as laid down in *R.* v. *Everest* (*supra*), would have one day to be considered by the Court, but that it was not necessary to do so in the case then before them, as there had been ample warning, and there was corroboration, though it was noticeable that the latter was not given a distinguishing name For many reasons it is most unfortunate that there should be any doubt as to what the law really is. The matter is one of importance, and it constantly recurs. It is submitted that the law as to this branch of the subject is rightly laid down in *R.* v. *Everest,* and *R.* v. *Warren;* that it is supported by a succession of cases which occurred before the Criminal Appeal Act; that it is in accordance with common sense, and that if the *dicta* in *R.* v. *Havard and Lewis* are correctly stated above, and are to be taken as rightly expressing the rule with regard to the nature of the corroboration required, they are in conflict with a line of cases extending back a hundred years.

If we turn to the other branch of the subject, we find that there are *dicta* in the judgments in *R.* v. *Everest* and *R.* v. *Warren,* which seem to point to distinct progress towards a more stringent rule as to the duty of the Judge. It is practically said that if there be no corroborative evidence which implicates the accused, the Judge should withdraw the case from the jury or direct them to acquit and not leave it to them with a direction that they may, if they choose, convict on the uncorroborated evidence of an accomplice, though they ought not to do so. Besides being contrary to nearly all the cases before the Criminal Appeal, this is contrary to a dictum in an earlier case which came before the Court of Criminal Appeal itself, where it was said that the Court would not lay down any rule that a person may not be convicted on the sole evidence of an accomplice, if there has been a proper direction: *R.* v. *Beauchamp* (73 J. P. 223). There is also a later case somewhat to the contrary (*R.* v. *Gay,* 2 Cr. App. R. 327), and in the two latest cases, *R.* v. *Havard and Lewis,* and *R.* v.

Brown (No. 2). similar *dicta* occur. On this point, therefore, no rule has been clearly established, though the judgments in *R.* v. *Everest* and *R.* v. *Warren* (*supra*), seem to us to point in the right direction, and to be in agreement with the trend of modern practice.

Some confusion is clearly noticeable, both as to the nature of the corroboration required and as to the direction which the Judge ought to give, in the failure to distinguish clearly between cases where the chief evidence is that of an accomplice admitted to be so and cases arising from offences committed against girls or women, when the girl or woman may or may not be an accomplice: See *R.* v. *Henry Hedges* (3 Cr. App. R. 262), *R.* v. *Benjamin Brown* (6 Cr. App. R. 24), *R.* v. *Stone* (6 Cr. App. R. 89, at p. 96). In the cases of incest or carnal knowledge, in which the girl or woman is clearly not an accomplice, no corroboration is required, and the only duty of the Judge is to caution the jury as to the danger of convicting upon the evidence of the one witness against the denial on oath of the accused, unless there be other evidence which confirms the story of the girl or woman. The confirmation need not relate to the accused. This rule was clearly established by *R.* v. *Graham* (74 J. P. 246, cited *ante*). In the later cases of *R.* v. *Benjamin Brown* (No 1) and *R.* v. *Stone* (*supra*), which purported to follow *R.* v. *Graham*, the Court held, in the first case, that the girl probably was an accomplice, and, in the second, that undoubtedly she was, but seem (as reported) to have said also that, even so, a warning of the kind stated in *R.* v. *Graham*, where the girl clearly was not an accomplice, would have been sufficient. It is submitted that this cannot be the law, but that the true rule is that where it is not admitted by the prosecution that the girl is an accomplice and from the evidence given for the prosecution the matter is doubtful, the Judge should direct the jury that they must, first of all, satisfy themselves whether the girl is an accomplice or not; that if they hold she is they ought not to convict unless there is trustworthy corroborative evidence in material particulars implicating the accused; that if they hold she is not, they may convict upon her evidence alone, but should bear in mind the possible danger of convicting upon the evidence of one witness alone against the denial of the accused on oath, unless they consider her story is confirmed by other evidence: See *R.* v. *Stone* (6 Cr. App. R. 89, at p. 95).

Where it is admitted or quite clear that the girl is an accomplice, and there is no corroboration in material particulars implicating the accused, it may be that the Judge should either withdraw the case from the jury or direct them that they ought to acquit the accused, but this is still doubtful. If, in the opinion of the Judge, there is such corroboration, he should leave the case to the jury with the direction that they may act upon the evidence of the accomplice only if they are satisfied that it is confirmed by other independent, trustworthy evidence in material particulars pointing to the guilt of the accused.

It is clearly established now, that though there be no direction of the jury by the Judge as to the evidence of an accomplice, yet if the Court of Appeal find substantial corroboration by independent evidence which implicates the accused, the Court will refuse to interfere with the conviction on the ground that no substantial miscarriage of justice has actually occurred: *R.* v. *Tate* (72 J. P. 391), *R.* v. *Bowles* (2 Cr. App. R. 168), *R.* v. *Kirkham* (2 Cr. App. R. 253, 255). It was also clear till the last two cases decided by the Court that, if there be some caution but no corroboration of the kind required, the Court will quash the conviction on appeal: *R.* v. *Everest* and *R.* v. *Warren*. It may be that these earlier cases are distinguishable from the later in that the warning in the latter cases was very ample, while in the earlier cases the summing up left something to be desired in this respect It is eminently desirable that, both as to the nature of the corroboration required and as to the duty of the Judge under the varying circumstances which arise, there should be no room for doubt as to the principles which ought to be applied, though there will probably be always room for doubt as to their actual application.

LIQUIDATED DAMAGES AND ESTOPPEL BY CONTRACT.

JOSEPH H. DRAKE, in *Michigan Law Review*.

In the last edition of Sedgwick"s Elements of the Law of Damages the author says (p. 232) that the subject of liquidated damages has been put in a new light by two cases of the *Sun Printing and Publishing Association* v. *Moore*[1]

[1] (1901), 183 U. S. 642.

and the *Clydebank E. & S .Co.* v. *Castaneda*,[2] and that they may be expected to have a considerable effect upon the further development of the law on the subject. The learned author then presents the old canons of interpretation with full illustration from the cases, followed by the citation of the decisions above mentioned, and concludes that in the light of these cases the old technical views of the canons of interpretation can no longer be regarded as conclusive. An examination of some of the cases recently decided may be helpful in determining the meaning of these decisions.[3]

A few months before the decision in the *Sun Ass'n* case (*supra*) was handed down by the United States Supreme Court, a case on a somewhat similar state of facts was decided in the Seventh Circuit of the Circuit Court of Appeals.[4] In this case the plaintiffs had executed a bond conditioned that it should be void if the work of clearing off a lot preparatory to building should not be completed in accordance with the contract by April 1, 1897, but by which they bound themselves in the sum of $20,000, "computed and agreed upon by and betweeen the United States of America and themselves as liquidated damages and not as penalty, to be immediately due the United States on the first day of April, 1897." The Court held that the loss from a slight delay in delivery of the lot ready for the new building would be easily calculable and therefore the sum mentioned in the bond was penalty and not liquidated damages.[5] The Court said that in such cases "unless it is clear that . . . it would be difficult or impossible to assess the actual damages from testimony" the Court must admit the testimony to prove a penalty. This statement is cited with disapproval by the United States Supreme Court in the case to be considered next.

In the case of the *Sun Printing and Publishing Ass'n* v. *Moore* (*supra*) a yacht was chartered by the newspaper company to gather news of the Spanish-American War. Among other provisions it was agreed "that for the purpose of this charter the value of the yacht shall be considered and

[2] [1905], A. C. 6.

[3] The following from the State Courts may be cited as suggestive: *City of York* v. *York Rys. Co.* (1910), — Pa. —, 78 Atl. 128; *Mosler Safe Co.* v. *Maiden Lane Deposit Co.* (1910), — N. Y. —, 93 N. E. 81; *Cleveland Crane & Car Co.* v. *American Cast Iron Pipe Co.* (1910), — Ala. —, 50 South 313.

[4] *The Chicago House-Wrecking Co.* v. *United States* (1901), 106 Fed. 385.

[5] *Cf. Kemble* v. *Farren*, 6 Bing. 141.

taken at the sum of $75,000." The yacht was wrecked and became a total loss. The Supreme Court quoted the *Chicago House Wrecking* case (*supra*) and the *Gay Mfg. Co.* v. *Camp*[6] as saying "where actual damages can be assessed . . . the Court . . . must require proof of the damages." It said this doctrine was wrong in principle and refused to consider evidence that the loss was less than the sum mentioned. Both these decisions would seem to be right. The Supreme Court is right, too, in part at least, in its disapproval of what it calls the doctrine of the cases in the lower Federal Courts, but that the Supreme Court does not make plain just what its own doctrine is and why it differs from the lower Courts is evident enough from the use that has been made of the decision subsequently by the Courts and by commentators on these cases. The distinction between the cases may be made by invoking the principle of estoppel. In the *Chicago House Wrecking* case both parties were considering an undeterminable future event; namely, the failure to finish a task on time, and there was nothing in the situation to prohibit them from considering all the possibilities as to value of the breach, taking into account the agreement itself, the sum mentioned in the bond, the subject matter of the contract and the possible combination of events attending the breach, if it occurred. Nor when the case came to trial was there anything to prevent the Court from admitting testimony in regard to any one of these points. It may be noted here in passing that a different interpretation might have been placed upon the situation after full consideration of evidence on all the above mentioned points. Damages for delay in the performance of a contract if reasonable, may be stipulated.[7] See also *City of York* v. *York Rws. Co.*,[8] to be considered later. It seems though, as said above, that the decision was right. Possibly if the sum mentioned had been something less than $20,000 the conclusion might have been different.

In the *Sun Ass'n* case the situation of the parties making the agreement is entirely different from what it was in the previous case. The parties are not looking toward an undeterminable future event, but are attempting to arrive at a rough estimate of the value of an undeterminable present

[6] 65 Fed. 794, 68 Fed. 67.
[7] *Monmouth Park Assoc.* v. *Wallis Iron Works*, 55 N. J. L. 132.
[8] (1910), — Pa. —, 78 Atl. 128 (*supra*).

fact—the yacht had no market value. They agreed upon the sum of $75,000 as the value of the yacht and on the strength of that agreement Moore parted with his property.

The *Clydebank, etc.*, case (*supra*) is cited by Sedgwick[9] along with the *Sun Ass'n* case as if the two cases were analogous, each illustrating the new idea of "liquidation by preascertainment," a phrase adapted from the utterance of Lord Robertson in the first mentioned case.[10] It would seem possible to differentiate these two cases on their respective facts. In the *Clydebank, etc.*, case the appellants had contracted with the Spanish Government to build four torpedo boats, to be delivered within varying periods. The contracts provided that "the penalty for later delivery shall be at the rate of £500 per week for each vessel." It is manifest that we have here the consideration by the parties of the value of an undeterminable future event; namely, the loss resulting from a failure to deliver. There is no question raised as to the exclusion of evidence of actual loss, and considering the contract in all its relations when made it is decided to be one in which a fair sum is fixed as the value of an undeterminable future event, which can, of course, be liquidated under the provisions of our old canon of criticism used for the decision in *Monmouth Park Ass'n* v. *Iron Works* (*supra*). The Court, however, lays stress on the "preascertainment" and ignores the conditions that make the preascertainment significant. It may be noted here that the case upon which the opinion of Lord Davey rests,[11] in which respondents agreed to "pay the lessor £100 per acre for all lands not restored at a particular date," the facts are on all fours with those in the yacht case (*supra*) as the parties have agreed as to a present fact; namely, the value of the land in case it is not redelivered. The sum fixed, though called a penalty by the parties, was held to be a liquidated sum by the Court which gave "preascertainment" as the reason, though the ultimate reason back of the preascertainment would seem to be the estoppel, as in the *Sun Ass'n* case (*supra*). In a subsequent Privy Council case[12] the "preascertainment" doctrine was called in to decide the question. A clause fixing damages for non-completion of a

[9] Op. cit. p. 249.
[10] See [1905], A. C. p. 19.
[11] *Elphinstone* v. *Monkland Iron & Coal Co.* (1886), 11 A. C. 332, 342 and 345.
[12] *Commissioners of Public Works* v. *Hill* [1906], A. C. 368.

railway, was held to be a penalty, as not being a pre-estimate of damages by agreement, but the agreement here was to forfeit ten per cent. retention money in case of delay in completion, and this sum might have been very large in case of a slight delay the value of which could be easily calculated, bringing this case exactly in line with the *Chicago House Wrecking* case (*supra*).

In a later case[13] the Court approves the principle of *Sun Ass'n* v. *Moore* (*supra*) and holds that a provision of $35 a day for slow delivery of disappearing guns was liquidated damages although the term "liquidated" was not in the clause in question and the word "penalty" was used repeatedly by both parties in the correspondence. The Court in this case gives some hint of what it means in talking of the "principle" laid down in *Sun Ass'n* v. *Moore* by saying that formerly in all cases of doubt the tendency of the Courts was to construe the provision as being a penalty whereas now the Courts have become "strongly inclined to allow the parties to make their own contracts." The facts in the *Bethlehem* case are exactly on all fours with those in *Clydebank Co.* v. *Castaneda* (*supra*) the sum being fixed in the American case for delay in furnishing disappearing guns instead of torpedo boats and in both instances the war in which the material contracted for was to be used, came to an end before the time fixed for delivery. In both cases the Court gives as a reason for the decision the "liquidation by preascertainment." The same distinction on the facts can be made between this later U. S. Court case and the earlier one, the *Sun Ass'n* case (*supra*) as was made between that later case and the English case. In the *Bethlehem Steel Co.* v. *U. S.* there was an agreement as to the value of an undeterminable future event, failure to deliver disappearing gun carriages. The Court said the principle decided in that case [*The Sun Ass'n* v. *Moore*] is "much like the contention of the government herein," but as has been seen above in the examination of the *Clydebank, etc.*, case, the facts of the two cases are so different that they can scarcely be included under the same principle.

Since the decision in the *Sun Ass'n* case a number of cases have been decided in the lower Federal Courts which have used the statement in the *Sun Ass'n* case as authority for denying the admission of evidence to prove penalty, but

[13] *United States* v. *Bethlehem Steel Co.* (1907), 205 U. S. 105, 119.

each of the cases showed on its face that the actual damages were difficult of computation. Three of these cases[14] are agreements to pay a definite sum per diem for delay in delivery. In all of them the *Sun Ass'n* case in quoted as a controlling authority and as if the Supreme Court in that case had laid down a new canon of interpretation by its refusal to consider evidence as to the intention of the parties to the agreement.

In several other Federal cases[15] there were agreements to pay a lump sum in event of failure to furnish goods or perform service. Each one is decided on the precedent of the *Sun Ass'n case* (*supra*) with some such statement as that in *Brooks* v. *Wichita* (*supra*), "the case at bar falls directly within the doctrine of the Supreme Court" in the *Sun Ass'n* case[16] All these cases are in their facts on a par with the *Bethlehem Steel Co.* v. *U. S.*, and are decided on the same principle, or rather by the same method; i.e., by considering the contract, the sum mentioned and the subject matter of the contract, and, with all these points before the Court, determining whether the agreement is one by which independently of the stipulation the damages would be uncertain, or incapable, or very difficult of ascertainment, in which case the damages may be liquidated;[17] or whether, on the other hand, the sum agreed upon is one fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation according to the ordinary legal standard, and for any of which the stipulated

[14] *Wood* v. *Niagara Falls Co.* (1903), 121 Fed. 818; *Stephens* v. *Essex Park Com.* (1906), 143 Fed. 844; *Chapman Decorating Co.* v. *Mut. Ins. Co.* (1906), 149 Fed. 189.

[15] *Brooks* v. *City of Wichita* (1902), 114 Fed. 297; *United States* v. *Alcorn* (1906), 145 Fed. 995; *Turner* v. *City of Fremont*, 159 Fed. 221, again in 170 Fed. 261; *Blodget* v. *Live Stock Co.*, 164 Fed. 307.

[16] In the case of *Brooks* v. *Wichita*, an agreement had been made by Brooks with the city that in the event of his failure to furnish 150 arc lights by April 1, he was to forfeit and pay to the city as liquidated damages and not as penalty the sum of $10,000. It might well have been argued in this case as it was in the *Chicago House Wrecking* case, that if the contract had been fulfilled by April 1 in every respect except some small detail, it could hardly have been contemplated by the parties that the full amount of $10,000 should have been exacted.

The case of *United States* v. *Alcorn* (*supra*), arose on a proposal bond for carrying mail, and although the actual damage had been proved to be $336 and paid to the Government, this did not prevent the United States from recovering the face of the bond less this sum.

[17] *Cf. Strickland* v. *Williams* [1899], 1 Q. B. 382.

sum is an excessive compensation, in which case it would be considered a penalty.[18]

In the *City of York* v. *York's Rws. Co.* (*supra*), a bond was given by the defendant "that the said bond (in the sum of $25,000) shall be forfeited to and collectible by the city as assessed and liquidated damages due and owing said city in the event of failure of the company to complete and operate its line of railway within the time stated." This was held to be liquidated damages. The defendant argued that this was a penalty under the canon which says that where an agreement contains several matters of different degrees of importance and yet the sum is payable for the breach of any, even the least, it is to be construed as a penalty . The Court while not denying that the principle contended for had been recognized by the Pennsylvania Court, said there was nothing in it which forbade an express contractual stipulation that the whole sum named . . . shall be collectible as liquidated damages . . . provided that contemplated breach is of such a nature that the damages would be impossible or most difficult to ascertain. The Court thus acknowledges the validity of both canons of interpretation, but holds that the second applies and not the first. The facts here are almost identical with those in the *Chicago House Wrecking* case (*supra*) in which the sum named was held to be a penalty, the Court reaching this conclusion by holding that the first canon applied and not the second. In the *Cleveland Crane, etc., Co.* v. *Am. Pipe Co.* (*supra*) there was an agreement to pay $25 a day as liquidated damages for failure to deliver cranes by a certain date. The Alabama Court held the agreement to be one for liquidated damages in accordance with the canon of interpretation cited in the York (Pa.) case, quoted above. The New York case of *Mosler Safe Co.* v. *Maiden Lane Co.* (*supra*) providing for a specified sum to be paid for each day's delay in completing the contract, was held to be liquidated damages by reference to the same canon of interpretation.

These last three cases, recently decided by Courts not immediately under the influence of the United States Supreme Court, seem to have been decided in ignorance of the decisions in the United States Court, or at least, without any appreciation of their bearing upon the old canons of interpretation, and they are all decided just as they would

[18] *Cf. Kemble* v. *Farren*, 6 Bing. 14.

have been if the new doctrine of liquidation by preascertainment had been applied to them.

We may perhaps conclude then that the new light thrown on the subject of liquidated damages, by the two cases cited at the beginning of this article, shew us that in case we have to determine the meaning of an agreement in reference to the value of an undeterminable future event, the old canons may be used as of yore to aid in the interpretation of the contract, recognising that we may have difficulty in each instance in determining whether our agreement is one to do a single thing of an indeterminable value or to do several things, one or more of which has an easily calculable value. In all of these cases the fact that the sum has been predetermined by the parties is not the significant element in the decision, but the fact that the agreement may be one or the other of those mentioned above. The old canons of interpretation are appealed to for aid in the actual determination of the question of penalty or liquidated damages whether we acknowledge the doctrine of "preascertainment" or not, and no more since than before the decisions by the United States Supreme Court and the House of Lords can the parties "preascertain" and fix upon what is actually a penalty under the guise of liquidated damages

It is not to be concluded, however, that the *Sun Ass'n* case is not of great importance in assisting in the determination of similar cases, but its importance does not depend upon the fact that it lays down a new canon of interpretation nor abrogates any of the old ones. Nor does its importance consist in the fact that there was in it a preascertainment of the sum by the agreement of the parties. It is important because such preagreement was in regard to a present fact and as such gives us the necessary conditions of estoppel. This can not be invoked in the other class of cases because they are all instances of agreement in regard to a future event, which is only a matter of opinion and not a statement of a present or past fact by the acknowledgment of which the other party has been persuaded to change his position.

It is true, too, that the discussion of these cases by the Supreme Courts has made evident a changed tendency of the Courts in handling such cases, a change which is perhaps best expressed in the language of Mr. Justice Peckham in *Bethlehem Steel Co.* v. *U. S.*[19] "The Courts at one time

seemed to be quite strong in their views, and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty so that nothing but the actual damages sustained by the party aggrieved could be recovered. Subsequently the Courts have become more tolerant of such provisions, and have now become strongly inclined to allow parties . . . to carry out their own intentions . . . upon proof of the violation of the contract and without proof of the damage actually sustained."

It is true that this pronouncement by the United States Supreme Court of the tendency of the Courts has been used by some of the lower Federal Courts very much as though it were a binding rule of interpretation, notably in *Brooks* v. *City of Wichita*,[20] *Turner* v. *City of Fremont*,[21] *United States* v. *Alcorn*,[22] although it actually leaves us just where we were in handling cases of the type of these last mentioned; namely, those in which the Courts are dealing with an undeterminable future event. It is only when we have before us the somewhat unusual state of facts presented in the *Sun Acc'n* case,[23] where the parties have agreed upon a present fact, that the peculiar doctrine of that case may be of assistance to us, and this peculiar doctrine is after all nothing more than the simple principle of estoppel by contract.

[20] 205 U. S. 119.
[21] 114 Fed. 297.
[22] 159 Fed. 221.
[23] 145 Fed. 995.
[23] The only other case in which a similar state of facts appears is *Elphinstone* v. *Monkland Iron & Coal Co.* (1886), 11 A. C. 332.

The Library

"And what of this new book?"—*Sterne.*

"Men disparage not antiquity who prudently exalt new enquiries."
—*Sir Thomas Browne.*

The Nineteenth Century and After. London: Spottiswoode & Co., Ltd., New Street Square, E. C. Price, Half-a-Crown. June number.

1. Canadian Autonomy and American Reciprocity, (1) A Canadian View, by the Honourable Geo E. Foster, M.P. (late Finance Minister, Canada), (2) An English View, by Sir Roper Lethbridge, K.C.I.E. 2. The Constitutional Revolution, II., by J. H. Morgan (Professor of Constitutional Law at University College, London). 3. Sidelights on the National Economy and People of England, by Charles Morawitz (Vienna Chairman of the Anglo-Austrian Bank). 4. The Muddle in Egypt and the Way Out, by Ralph Neville (for six years Judge in the Egyptian Native Courts) 5. Stonehenge and the Hyperboreans, by the Honourable Emmeline Plunket. 6. Some Notes on Chateaubriand (concluded), by W. S. Lilly. 7. The Blight of the Land Taxes; a Retrospect and a Prospect, by Charles Newton-Robinson. 8. Conversations at the Salon and the Royal Academy, by H. Heathcote Statham. 9. The Facts at the Back of Unemployment, by W. H. Mallock. 10. Señora Santa Anna's Misadventure; A Mexican Reminiscence, by the Baroness De Malortie. 11. The Ornaments Rubric; a Reply to Mr. Lathbury, by the Rev. Canon Beeching. 12. The Government Scheme of National Insurance, by A. Carson Roberts. 13. "Confusion Worse Confounded," by Noel Pemberton Billing.

The
Canadian Law Times.

VOL. XXXI. JULY, 1911. No. 7.

R. V. ROGERS, K.C.

"Give's another shake of your hand
McLure; I'm proud to have met you;
You are an honour to our profession."

(Words overheard by James Soutar, cynic-in-ordinary.)

One of the best types of men, an admirable member of the profession passed on when Dr. Rogers died last month.

Unless well constituted, a lawyer with his constant disputes and contentions on behalf of other people, often leaves grievances and resentments behind him. But here was a man with strong mind and sound learning, who could firmly maintain his clients' rights and yet impress both legal and lay opponent as being fair and genial. In the last analysis of a lawyer's success, geniality is not as a rule highly appraised, because its possession interferes with the cold-blooded treatment of business, which many deem essential. But after the career is over how shrunken is the estimate of the man without it, as compared with the memory of one from whom it radiated.

R. Vashon Rogers—as he signed himself—was born in 1843. His father was Anglican incumbent of St. James', Kingston, and a public spirited citizen. Robert graduated at Queen's College in 1861, and had as contemporaries there Sir George A. Kirkpatrick, K.C., Judge Price, E. G. Malloch, K.C., John McIntyre, K.C., G. M. Macdonnell, K.C., and Judge McDonald. He was admitted in 1865, and was a partner with the Kirkpatricks until the death of George A. His clients were chiefly from the business houses, and among the families of moderate capital and leisure, of which Kingston contained such a number, and he was known to the farmers of Frontenac from his connection with the Kirkpatricks, respected political representatives.

Mr. Rogers' professional life is marked chiefly for his wide knowledge, and by the diversity of his contributions to legal literature. All of these reflect the irrepressible jocularity of his thought. He saw a comedy in every law suit, and enlivened prosiness of practice by emphasising the *facetiæ,* as does Sir Charles Darling in England, and Irving Browne in America. But the learning and industry required to produce his books and essays were quite exceptional.

His first book, written some time after his own marriage tour, about 1870, was similar in idea to Howell's "Their Wedding Journey." This book at first was scarcely taken seriously because of its airiness, and its unlikeness to a text book, including the absence of calf binding, and of dullness. It was unusual. Then it dawned upon the profession that "The Wrongs and Rights of a Traveller" was a novel compendium of all that need be known in practice regarding lost and damaged luggage, expulsion of passengers and negligence in management of train and steamer. The book was especially well received in the United States, whose habits of travel and hotel life are so similar to our own, as it gave numerous citations from State decisions. I often wondered how Mr. Rogers, even with his industry, was able to get so much reading on this and other subjects; as his visits to the law libraries at Albany were not frequent, and it is noteworthy that in this work and "The Law and Medical Men" (1884, Carswell), the author is the only Canadian who has dealt copiously with American decisions. So also with his contributions during 1872-1897 to periodicals. He was a valued contributor to the *Green Bag* and *Albany Law Journal,* and his reference to American cases was accurate and exhaustive. The *Irish Law Times* also was glad to give him space and remuneration, while our own magazines frequently depended upon his facility in discussing topical subjects. Throughout his articles there is the thread of humour and the intimate knowledge of practical life, together with an enviable familiarity with general literature, history and authorship. Many a practitioner has had cause to be thankful for his industry and accuracy in these occasional articles, and to rejoice that there was some one to tackle the problems of domestic law thought by authors to be too trivial for text books.

"R. V. R." would take amusement out of every subject and so could his readers. He would poke fun at human

weakness and superstition in "Oaths" (9 Green Bag 57), and revel in jest in such serious subjects as "Graves, Gravestones and Grave Subjects" (26 C. L. J. 100). How could he be expected to be quite serious when dealing with "Wives and Widows," "Law for Ladies," "Unmarried Ladies." What unknown cases he fished up there to shew the limits of severity allowed to wives with hen-pecked husbands, or in dealing with the specious excuses allowed in Western divorce Courts. In "Some Things about Theatres," 6 Green Bag, and "Music in the Courts" (27 C. L. J.), there is a light but useful treatment of remedies of and against public entertainers and ticket holders, while "Upstairs and Downstairs Tenants" (20 C. L. J. 82), is good for reference, now that the apartment house is so prevalent.

In surgical, accident and assault cases "Value of Human Body and Bones" (1 C. L. T.) and "Value of Human Limbs" (27 C. L. J.), may well be consulted notwithstanding that the cases cited have been much superseded.

There is a great deal which bothers the practitioner in advising on a client's rights about the law of animals. "R. V. R." will help him in "Dogs," "Cats," "A Legal Aviary" and "Legal Entomology." The Sunday cigar conviction may be added to "Tobacco and Smoking" (30 C. L. J.).

Robert Rogers had the advantage of being a well bred man. In voice, appearance, disposition and habits he was satisfactory. *Et erat vir ille simplex et rectus.* He feared God, and eschewed evil.

Toronto, June, 1911. H. M. MOWAT.

JURISPRUDENCE.*

The main object of the present article is no less ambitious than to give a clear meaning to the word "Jurisprudence." I have, however, ventured to add a few tentative and diffident observations upon the German and English Schools of Historical Jurisprudence respectively. Jurisprudence is the science of positive law, but to say that is to do little more than substitute a longer name for a shorter. We want to know what is a science, and what is positive law; and then what are the contents and scheme of this science; how does it treat its subject-matter, and what is the end it professes to achieve?

* From the *Law Quarterly Review.*

Now, when we say that jurisprudence is a science, we mean something more than that it is knowledge co-ordinated, arranged and systematised, to quote a dictionary definition of a "science." We mean, further, that the legal phenomena which are its subject-matter may be traced, and are by it traced, to ultimate laws of human nature; and that, to adopt words of Professor Holland, its generalisations will hold good everywhere by virtue of the fact that these legal phenomena possess everywhere the same characteristics.[1] "Positive law" means, in Austin's words, "law established or *positum* in an independent political community, by the express or tacit authority of its sovereign or supreme government;"[2] that is to say, actual law, as distinguished from any ideal or imaginary law.

Jurisprudence, then, is such a knowledge, or such a system of generalisations about the actual laws of one or more countries.

But this still leaves us in the dark, for we want to know what is the nature of the contents of this science of positive law, what does it aim at teaching us, and what does it accomplish? Austin replies that Jurisprudence, or, as he prefers to call it, "General Jurisprudence," is "the science concerned with the exposition of the principles, notions and distinctions which are common to systems of law; understanding by systems of law, the ampler and maturer systems which, by reason of their amplitude and maturity, are pre-eminently pregnant with instruction:" And again:—

"The proper subject of General or Universal Jurisprudence (as distinguished from Universal Legislation), is a description of such subjects and ends of law as are common to all systems; and of those resemblances between different systems which are bottomed in the common nature of man, or correspond to the resembling points in their several positions."[3]

But this is still so vague and general that it leaves us yet in the dark as to what is the scope of our science. We want to know the nature of these principles, notions, and distinctions, subjects and ends of law, with which Jurisprudence is concerned, and how it deals with them. Austin gives us a partial answer, saying:—

[1] Holland's Jurisprudence, 9th ed., p. 10.
[2] Lectures, 5th ed., vol. ii., p. 1072.
[3] Lectures, 5th ed., vol. ii., pp. 1073, 1077.

"Of the principles, notions, and distinctions, which are the subjects of general jurisprudence, some may be esteemed necessary. For we cannot imagine coherently a system of law (or a system of law as evolved in a refined community), without conceiving them as constituent parts of it. Of these necessary principles, notions, and distinctions I will suggest briefly a few examples: First, the notions of duty, right, liberty, injury, punishment, redress; with their various relations to one another, and to law, sovereignty, and independent political society; secondly, the distinction between . . . law proceeding from a sovereign or supreme maker, and law proceeding immediately from a subject or subordinate maker with the authority of a sovereign or supreme maker; thirdly, the distinction of rights, into rights availing against the world at large (as, for example, property or dominion), and rights availing against persons specifically determined (as, for example, rights from contracts); fourthly, the distinction of rights availing against the world at large, into property or dominion, and the various restricted rights carved out of property or dominion; fifthly, the distinction of obligations . . . into obligations which arise from contracts, obligations which arise from injuries, and obligations which arise from incidents that are neither contracts nor injuries . . . But it will be impossible or useless to attempt an exposition of these principles, notions, and distinctions, until by careful analysis we have accurately determined the meaning of certain leading terms which we must necessarily employ; terms which recur incessantly in every department of the science; which, whithersoever we turn ourselves, we are sure to encounter. Such, for instance, are the following: law, right, obligation, injury, sanction, person, thing, act, forbearance."[4]

In what sense, indeed, Austin used the words "principles" in this passage is not so clear. He certainly does not mean principles of law in the sense in which ordinary lawyers use that expression. They mean simply broad general rules of law. Austin seems to mean "essentials, fundamentals, basal ideas and conceptions."

Apart from this, these passages give us no general and comprehensive understanding of the scope and contents of jurisprudence, nor shall we get one until we realise that all "notions and distinctions" of law are notions or distinc-

[4] Ibid., pp. 1074-5.

tions about different relations with each other into which men are born, or grow, or enter by some form of voluntary transaction, or are placed in by the law itself; and the distinctions between these relations, and between rights and obligations implied in, arising from, or otherwise attached to them. Law is concerned only with relations between persons, and consequences arising therefrom. These relations may be between one or more individuals, and people in general, as for example, the relation between a man who owns a certain piece of property, and people in general who do not own it, or they may be between one or more individuals and one or more other individuals, as for example, relations arising out of contract, or the relation which arises between one who has done another an injury and the man he has injured. The subject of jurisprudence is such of these relations as the law recognises by attaching rights or obligations to one or other, or both the parties, to them; and the general character of such rights and obligations. These relations, and the ideas involved in the very conception of them, and the purpose of regulating them, are the common element in all mature systems of law; Professor Holland brings this out very clearly. Jurisprudence, he tells us, is "the formal science of those relations of mankind which are generally recognised as having legal consequences:"[5] or, again, jurisprudence, he says, "is a formal, or analytical, as opposed to a material science; that is to say, it deals rather with the various relations which are regulated by legal rules than with the rules themselves which regulate those relations."[6]

What, however, may puzzle the student of Professor Holland's book is, that after the first chapter in which he thus defines the subject-matter of jurisprudence, we hear nothing more of relations *eo nomine*. What Professor Holland proceeds to do is first to define and explain what is meant by positive law, finding, in the result, that it is "a general rule of external human action enforced by a sovereign political authority."[7] Then he proceeds to enumerate and discuss the various sources from which the rules of positive law are derived. Next he explains that law exists for the definition and protection of rights; and analyses a legal right into its essential elements. He then explains the leading classifications of legal rights; and having selected

[5] Lectures, 10th ed., p. 9.
[6] Ibid., p. 6.
[7] Ibid., p. 40.

his own fundamental lines of distinction between them, proceeds in the rest of his book to enumerate and discuss the general nature of the legal rights falling under the different categories thus arrived at, not hesitating, happily, to illustrate and explain them liberally by reference to the actual rules of Roman and English law.

The matter would perhaps have been clearer to the ordinary student if it had been explained, as the fact is, that the rights thus dealt with are distinguished from one another, not as different in themselves, but as arising out of different relations. Thus the right of an owner of a piece of land to take possession of it, and the right of a leasehold tenant of a piece of land to take possession of it, are regarded in detachment, the same kind of rights. Each is a right to take possession of land. But we do not find them classified together by Professor Holland. Why? Because they are the legal consequence of, and arise out of, two quite different relations. The one arises out of the relation between a man who owns a piece of property and people in general. The other arises out of the relation between lessor and lessee under a contract of lease.

So quite consistently with his definition of jurisprudence, what Professor Holland really distinguishes between are the various relations between men generally recognised in mature systems of law; and legal rights are only distinguished by him as arising out of, or being "the legal consequences" of, distinct relations.

Thus the subject-matter of jurisprudence being these various relations between human beings and the conceptions involved in the comprehension of these relations, how does it treat this subject and what does it do with it? It enumerates and defines these relations, and classifies them according to a rational and logical method; it defines the conceptions involved in them and in the legal consequences, *i.e.*, the rights and obligations following upon them, such as "right," "duty," "remedy," "ownership," "contract," "possession;" and it indicates, in connection with each, the general character of those legal consequences.

Such being the subject-matter of jurisprudence, and the way it aims to deal with this subject-matter, what is the value of it all? What would we gain from such a science, if perfected? In the first place we should have arrived at an accurate analysis, explanation, and, consequently, appre-

hension of the terms which lawyers have to use, and the conception with which they deal; and as Austin himself somewhere says: "It really is important that men should think distinctly and speak with a meaning." And in the second place we should have a logically consistent and complete ground-plan of the whole field of law, enabling us, as it were, so to arrange our stores of knowledge of the actual rules of law, as we accumulate them, as to make our minds, aided by association of ideas, more retentive of them; and to render them more accessible to our memories when occasion arises to recall them; or enable us to codify the law on a complete and rational plan; and the value of this is not detracted from by the fact that, as has been pointed out, in dealing with the legal aspects of some particular department of human affairs or business, we may have to do with relations occuping different portions of the field.

Such is the science of law in the only sense which Professor Holland would dignify by the name of jurisprudence. It is more usual, however, to distinguish it as "analytical jurisprudence," or "general jurisprudence." For, in truth, the phenomena of law may be regarded from more than one aspect; and there is another aspect so fundamentally different from that in which analytical jurisprudence regards them that another kind of science of law, or another branch of the whole science of law, comes into sight, which seems equally entitled to the name of Jurisprudence.

Instead of considering the phenomena of law as they now exist in the maturer systems, we may apply ourselves to consider law in its development, and to arrive at such generalisations as may be discoverable concerning the growth of law. Hence arises a science of legal development, and it constitutes what is called historical Jurisprudence. Now the first thing to do is to distinguish legal history from historical Jurisprudence, and perhaps this cannot be better done than in the words of Professor Jethro Brown in his Austinian Theory of Law.

"'Legal history,' he says, 'affects to describe the actual development of law as it has been at the different periods of the national history. Historical jurisprudence should state, as far as may be, the moral, social, and economic causes which led to that development. The one answers the question, 'How?' the other seeks to find some answer to the question, 'Why?' The one describes legal development.

the other explains it. The one regards the development of the law more or less in isolation; the other is compelled to bring that development into relation with the general progress of the national life."[8]

Now the concluding words of this passage seem more suggestive of the German school of jurisprudence, founded by Savigny, than the English school, founded by Sir Henry Maine. For I venture to suggest, with diffidence, that there is this line of distinction between the two schools, that the German school where it deals with the origin of law deals rather with the developments of legal systems as a whole, while the English school deals rather with the development of juridical ideas and particular institutions within the legal system.

"According to the teaching of Savigny," writes Professor Sohm, "law must be regarded as a product of the entire history of a people; it is not, he contends, a thing that can be made at will, or ever has been so made; it is an organic growth which comes into being by virtue of an inward necessity, and continues to develop in the same way from within by the operation of natural forces."[9]

And it could easily be shewn that in a broad sense this is true of legislation itself. Now Professor Vinogradoff has shewn us that this German school had an historical origin and explanation.

"'It represented,' he says, 'a powerful social doctrine which had sprung into being in Europe's struggle against revolutionary rationalism as embodied in the French Republic and in Napoleon's Empire. Romantic in its appeals to archaic custom and national traditions, conservative in its legal creed, the first school of historical jurisprudence entered the lists in suppport of a conception of law determined by historical antecedents, by a growth of national psychology hardly less instructive than the evolution of language itself."[10]

The English school of historical jurisprudence, on the other hand, had a scientific origin and explanation rather than a political. As the editor of this *Review* has said: "The transformation of political science about forty years ago cannot be disconnected from the all but simultaneous putting forth of new and far-reaching ideas in the study

[8] The Austinian Theory of Law, p. 358.
[9] Institutes of Roman Law (Ledlie's trans.), p. 160.
[10] The Teaching of Sir H. Maine, An inaugural lecture, p. 9.

of organic nature. 'Ancient law' and the 'origin of species,' were really the outcome, in different branches, of one and the same intellectual movement, that which we now associate with the word 'evolution.'"[11] "Coming soon after the publication of Darwin's great book, which had made the theory of evolution a great force in natural philosophy," says Leslie Stephen, "Maine's 'Ancient Law' introduced a correlative method into the philosophy of institutions."[12] "His chief aim," says Professor Vinogradoff, "was to propagate in the domain of jurisprudence the same spirit and methods which had already given such splendid results in two newly created departments of science—in comparative philology and comparative mythology."[13] Thus Sir Henry Maine "did nothing less than create the natural history of law. He shewed on the one hand that legal ideas and institutions have a real course of development as much as the *genera* and species of living creatures, and in every stage of that development have their normal characters."[14]

Thus, then, to adopt once more words of Professor Vinogradoff, we have "two methods of scientific investigation which may be applied to the study of law; the method of deductive analysis on the basis of abstractions from the present state of legal ideas and rules, and the method of inductive generalisation on the basis of historical and ethnographical observation."[15]

Toronto. A. H. F. LEFROY.

THE NATURE OF A PARTNER'S LIEN.

One hundred years ago the Courts were hesitating as to whether the creditors of a partnership have a lien upon its assets to enforce payment of their debts. The decisions of Lord Eldon, however,[1] have been generally accepted, and it is now well settled that creditors, as such, have no greater rights in the assets of a partnership than in the assets of a sole trader. A partner, however, is said to have a lien on the firm assets to compel their application to the payment of

[11] Article on Comparative Jurisprudence in Journal of Society of Comparative Legislation (August, 1903).
[12] Dictionary of National Biography.
[13] The Teaching of Sir H. Maine, p. 15.
[14] Pollock's Notes to Maine's Ancient Law, Introd. pp. vii.-ix.
[15] The Teaching of Sir H. Maine, p. 18.
[1] *Ex parte Ruffin*, 6 Ves. 119; *Ex parte Williams*, 11 Ves. 3, 4.

firm debts[2]. It follows, therefore, that when one partner conveys not the firm's interest in those assets, but his own interest in those assets, the other partner is given in equity as against the vendee of the selling partner the right to compel the application of those assets to the payment of firm debts[3]. It is further settled that in equity creditors may avail themselves of the remaining partner's equity and thereby reach the assets of the former firm.[4] When the assets are conveyed by the firm,[5] however, or by a partner acting for the firm[6] it has been held generally that no lien remains through which the partners or the creditors can compel the application of those specific assets to the payment of firm debts. This follows from the fact that the partners in selling have intended to part with all their interest in the assets, and it would be inconsistent for them to retain any right in the nature of a lien in derogation of their sale. When all the partners have sold their respective interests separately, there is a conflict of opinion as to whether the vendors retain any right of which creditors can avail themselves.[7] A question has arisen whether or not a firm in making such a sale can preserve by express stipulation the partner's lien. It frequently happens in a sale by a partnership of all its assets, that the vendee covenants with the vendor to pay the vendor's debts. Sometimes the conveyance is expressly described as made "subject to the debts" of the firm. What is the exact effect of a transfer in these forms? To determine this we must consider what is the real nature of the partner's lien. The doctrine regarding the so-called lien has really arisen as a corallary to the well settled doctrine that an individual partner has no direct share in the title to the personal property of the firm, but owns only an equitable right to his proportionate share of the net profits after payment of firm debts.[8] It followed logically from this doctrine that when one partner sold his share in the firm, title to the firm assets still remained

[2] *Howe* v. *Lawrence*, 9 Cush. 553; see *Redick* v. *Skelton*, 18 O. R. 100, 103.
[3] *Bank* v. *Carrolton R. R.*, 11 Wall. 624.
[4] *Ex parte Ruffin*, 6 Ves. 119.
[5] *Howe* v. *Lawrence*, 9 Cush. 553.
[6] *Banks* v. *Carrolton*, 11 Wall. 624.
[7] *Case* v. *Beauregard*, 99 U. S. 119; *Menagh* v. *Whitwell*, 52 N.Y. 146; *Kimball* v. *Thompson*, 13 Met. 283; *Blake* v. *Sargent*, 160 Fed. 57.
[8] *West* v. *Akip*, 1 Ves. 239; *Fox* v. *Hanbury*, Cowp. 445; *Taylor* v. *Fields*, 4 Ves. 396. See *Mitchell* v. *Gormley*, 9 O. R. 139, 14 A. R. 55; *McDonald* v. *Gildert*, 3 N. S. O. 551, 555.

where it had been before and creditors as well as the remaining partner could compel the application of these assets to the payment of firm debts, but since in the early confusion regarding the nature of partnership, these rights were recognised clearly only by the Courts of equity, in reasoning backward from an established result the Courts came to describe this right as an equitable lien, although it was really only an equitable right of action and there was no lien upon the assets in any proper sense. All that was meant was that in equity, title to the assets still remained in the firm and could be reached by firm creditors by something in the nature of an equitable attachment.

A firm as vendor, therefore, can not preserve a lien in any proper sense, because the firm has no lien. It is plain that a purchaser from the firm may re-sell assets he has bought, although he knows he has bought from a firm which has debts. He may, however, be subject to a personal obligation to pay those debts, but this must be an obligation arising from agreement, express or implied. In the common case of a purchase accompanied by an express covenant to pay firm debts this is clear. A conveyance subject to the payment of debts raises a similar obligation by implication,[9] but since there is not a true lien on the assets for the payment of debts, the phrase cannot itself create a lien and a vendor who inserts in his conveyance such a stipulation, reserves no greater or different right than he would by a personal covenant, and creditors of the firm endeavouring in equity to avail themselves of this obligation in whichever form it is

[9] A partnership conveyed all its property to a corporation "subject to the payment by said parties hereto of the second part" of certain sums due from the partnership and specified. The Court cited the analogy of conveyance, subject to a mortgage which does not import an agreement to pay, but is a qualification of the estate granted and of the liability upon the covenants in the deed. Here, however, there was no incumbrance on the property conveyed. "The intent to qualify a liability arising from such lien upon the property conveyed could not, therefore, exist. The only conceivable intent with which this sewer contract was thus referred to was to furnish the evidence that the new company was to pay the plaintiff the amount which the partnership was bound to pay."

The Court also calls attention to the fact that the words here were "subject to the payment of," which in Massachusetts was held to make a distinction.

Dingeldein v. *Third Avenue R. R. Co.*, N.Y., 575, 578.

There is a dictum in a lower Court case that a transfer of the assets of a partnership "subject to" the firm debts did not necessarily import an agreement by the grantee to assume them. The Court, however, found that there was other evidence of such an agreement which should have been left to the jury. *King* v. *Israel*, 43 N.Y. s. 306. (App. Term 1897).

created, can stand in no better position than would the vendor himself in case of any express covenant to pay debts For example, if the vendor, by reason of false representations as to the nature or extent of the liabilities had entitled the vendee to an equitable defence against an action on the agreement for the payment of debts, the creditors would likewise be unable to compel the vendee to perform his agreement.

The cases have not clearly recognised the nature of conveyances under these circumstances and have sometimes talked as though by a conveyance subject to debts the partner's lien is preserved.[10] It is submitted, however, that the better considered cases hold that a conveyance by a firm subject to debts does not result in an equitable lien for the benefit of firm creditors.[11]

Boston, Mass. S. R. WRIGHTINGTON.

THE FEDERAL RAILWAY COMMISSION.

A few remarks about the "Board of Railway Commissioners." We are actually in a "commission mood." Federal and Provincial Governments vie with each other in the institution of "commissions," with the newest, the most extended and extraordinary powers. It seems, however, that the "Federal Railway Commission," created by 3 & 4 Edw. VII., ch. 38, amended by 4 & 5 Ed. VII., ch. 35, as reproduced in Can. Rev. Statutes, 1906, ch. 37 (sections 10 to 78), surpasses them all in power. It may be interesting to examine briefly some of its attributes.

There certainly was, before the above "Commission" was created, need of relief, for public suffering from the oppression of railway companies, but, we think, that our legislators, have given a remedy in too much haste, without having taken time to consider it fully.

It is difficult to classify this Commission, as its judicial species is quite new. Ordinary tribunals are satisfied to

[10] *Bulger* v. *Rose*, 119 N.Y. 459; *Conroy* v. *Woods*, 13 Cal. 626; *Olson* v. *Morrison*, 29 Mich. 395; *Tenney* v. *Johnson*, 43 N. H. 144.

[11] A conveyance by one partner to another on dissolution with agreement to pay debts does not preserve lien. *Maquoketa* v. *Willey*, 35 Ia. 323, 330.

So on a conveyance in trust for creditors, the lien is lost. *Couchman* v. *Maupin*, 78 Ky. 33, 36.

settle difficulties, which already have arisen about civil contracts, either to have them enforced, modified, or annulled. To a certain extent we can say that the fortune of every citizen is entrusted to them.

It is quite natural, then, that these tribunals be invested with great respect, equal to their authority, and that they be at the same time subject to certain rules, which can put a check to possible abuses of power.

This cannot be said of the Board of Railway Commissioners. It has, as all will admit, to deal with very important matters, involving in some cases large sums of money, and even more, the protection and security of the public.

No other Court, has, in a certain way, a larger jurisdiction; but we cannot say that its method of formation (we are not alluding in the least to its actual composition), inspires us with that respect which we so readily bestow on the tribunals of this country.

Members, or rather Judges, named for ten years (section 10), removable for cause by the Governor in Council, unable to sit after they have attained the age of seventy-five years, are not to be regarded as impressive of authority, as reliable, as our irremovable Judges, deemed by law to be practically above all reproach.

The classical division of power into judicial and legislative has assured the good working of our form of Government.

The creation of the Board of Railway Commissioners, certainly is an exception to the division above referred to, as it includes power both to judge and to legislate. That this proposition is well founded may be seen by referring to sections (26, a, b, &, & 30).

The question of delimitation of power of both Federal and Provincial Governments, is still an unsettled one, and probably always will be susceptible of controversy; and certainly has arisen anew by the constitution of the Board of Railway Commissioners.

Certain points, however, do not permit of discussion, in our humble judgment, and we would consider as one of them that each local legislature has alone jurisdiction in civil matters.

Taking that proposition as granted, as we desire to make these remarks as brief as possible, we can conclude, from the various dispositions of the law, that the Board of Railway

Commissioners, has undue jurisdiction so far as it deals with purely civil matters.

The following synopsis of a judgment of the Superior Court (Quebec), will illustrate this point very plainly:—

Blais is owner of higher land than that crossed by the railway track of the Grand Trunk Railway Company.

The property of the Grand Trunk Railway Company was subjected, by (501, Quebec, civil Code), to receive waters as they naturally flow from Blais's land. Nevertheless the company built a dam to prevent this flow. Blais took action against the company, which was dismissed by the Superior Court for the following reasons. "The submittal for approval to the Board of Railway Commissioners, of the character of such works, or specifications or plans thereof (Can. Rev. Statutes, ch. 37, sec. 251), is a condition *sine qua non*, a condition precedent to the institution, or exercise of a confessory action directed against a railway company having a federal charter, proprietor of land of a lower level to force it to receive waters which flow naturally from a land of higher level, and to recovery of damages resulting from its default to do so."

If every farmer in any part of Canada, is obliged to have his claim against a railway company, about certain work to be done to his farm approved by the Board of Railway Commissioners, we can fancy the indefinite number of matters left to its discussable authority. We can assuredly say that a "Commission" composed of only three members cannot very well dispose of them.

Another objectionable feature concerning the Board, is that it has the right to sit in any place in Canada (sec. 19).

There is danger, by reason of distances, that some cities or towns, particularly small ones, will have to suffer from the delay, and in some cases, from the absence of the "Commissioners."

As the intention of our law-makers was to create a "Court," as the Board of Railway Commissioners, is styled a "Record Court," it would have been better to organise it in the ordinary way, that is, to institute a Court, in railway matters, of first instance, composed of Judges sitting in every province, in numbers varying with the work to be done, and an appellate tribunal, sitting in Ottawa, whose rulings would have been final, except in a limited number of cases, where there might be an appeal to the Supreme

Court. This would have offered a more rational method of justice, in railway matters, and also a more speedy one.

It may be argued that the Commissioners can call in to assist them, experts (sec. 60), who can investigate in any part of Canada and report to the Board. Ultimately, however, the question must be decided in Ottawa, to the great handicap of the litigant, who will have to abide either by the report of the expert, or to go to considerable expense, unless the Board decides to proceed, with all its powers, to the place of domicile of the "interested parties."

Moreover, as far as our own experience goes, these inquests by experts are not always very serious and reliable as is evident by the following example:—

A had a farm crossed by a railway company B, which built one farm crossing instead of two asked for.

A after several demands on B, made application to the Board (sec. 26), for a decision on that point.

The Commissioners named an inspector, who, without giving notice to A, nor to his attorneys, accompanied solely by B's manager, made an investigation and reported to the "Commissioners."

The inspector gave the following extraordinary report, namely, that on the farm of A, B had built two farm crossings, instead of four previously ordered, and that such number was sufficient for the purposes of A!

The expert had, we presume, examined every farm in the locality but the right one!

After disclosure of the facts, it is true the "Commissioners" ordered another report.

This brings me to say, that the procedure followed by the "Commission," is vague, lax, and indefinite.

There is no disposition in the law concerning that "Record Court," for the fixation of costs, for regular advice to be given to the interested parties; all is left to the absolute discretion of the Board.

Working as a committee, advising Parliament of undue preference, overcharges, and other manœuvres of railway companies inimical to the public, the Board of Railway Commissioners, would have its *raison d'etre;* working as it is now, we humbly submit, that it disturbs, at least, the whole economy of our judicial system.

Quebec. LOUIS A. POULIOT.

CRIMINALS AND THE LAW.

The fundamental mistake of most reformers seems to be in not realising that the only way to regenerate society is to reform the individual, that labour for adults is largely thrown away, and that to accomplish anything, effort must be concentrated on the children. If every growing child were put in a wholesome environment, given a sound education, physical, mental, and industrial, and trained assiduously and constantly in hygiene and morals, in two or three generations most of the social problems calling for reform would disappear. It would not need the expenditure of as much money and energy as are now largely wasted on machinery and futile methods, to accomplish all this, and there are indications that its importance is being seen. The establishment of juvenile Courts and the segregation of young offenders who have been indiscriminately herded with the criminal class, the movement against child labour, compulsory education and truant officers, the securing of playgrounds, and the attention given to the physical defects and needs of children, all go to shew that a realization of the true basis of reforming society is dawning.

While it cannot be too much insisted upon that it is with the rising generation that the most telling uplift work can be done, and that it is impossible to reform mankind as to intemperance, dishonesty, crimes of violence, divorce, or any other of its shortcomings and faults, by legislation, there is no doubt that when it comes to dealing with the criminal classes, the character of the legislation we adopt is of great importance. The power and authority of the state to punish for moral guilt has been abandoned, and the basis of dealing with the offender has come to be the right of society to protect itself from crime, with the duty attached of reforming the criminal if possible.

The purpose of law and of discipline is deterrent, protective and reformatory. From having attached the death penalty to numerous minor as well as serious offences, and treated criminals worse than beasts, we have nearly done away with execution for any crime, and on a theory carried much too far for the benefit or safety of any one concerned, that crime is a disease, we have come in some States to deal with criminals as a privileged class. In a recent

number of a leading British periodical an Oxford graduate who had been subjected to a short term of imprisonment, says that he found life altogether too easy and comfortable to be a deterrent from crime, and that numbers of the vagabond class got themselves purposely incarcerated. There should be neither cruelty nor barbarism towards criminals, nor sentimental pampering of them.

There is enough truth in the theory that crime is a disease to indicate what the general method of its treatment should be. As has come to be the case in medicine, it should be primarily preventive. Of course the most effective preventive treatment possible would be to deal with children. Pending the adoption of such measures in their entirety, which it will take a long time yet to bring about, there are some beneficial steps which might be taken. There has been much discussion lately of criminal law and its administration. An influential conference on the subject has recently been held, numerous suggestions, some of them doubtless useful and wise, have been made, and the President has brought to the attention of the country existing defects. I venture to put forward two suggestions of which I have seen no mention.

(1) The head of Scotland Yard in London said not long ago that nine-tenths of the serious crimes there were committed by men who had served one or more terms of imprisonment, and who might be regarded as belonging permanently to the criminal class. His judgment was that if they could be eliminated from such a situation, violation of the law would be diminished to less than a third of what it has been. Why cannot this be done? Let the courts be clothed with the power, after two or more offences, in its discretion to pronounce a man incorrigible, who shall be sentenced for life, to whom no pardon shall issue. By an arrangement between the General Government and the States a colony could be established, say in the island of Guam, where escape would be impossible, and where under military guard the convicts could be made to earn their own living. Surely society has the right to protect itself from these incorrigibles, who are only released to again prey on it. They also are the class who reproduce their kind, and at present society puts no obstacle in the way.

It is exactly as if instead of forming colonies to which all lepers are compelled to go and remain, we permitted them after

a brief term in the hospital, to go where they please and to marry and produce more lepers. The incorrigible criminal is worse than the leper because he deliberately and purposely defies society and spreads his contagion. It can hardly be questioned that the permanent segregation of the professional criminal class would very greatly diminish crime, nor can it be questioned that society has the right to adopt such a measure of protection, nor that it would be entirely practicable.

(2) There is also a change in the present method of administering the criminal law which while it may be open to objection can hardly fail if tested to insure ameliorated conditions. Society is interested in apprehending, convicting and punishing the criminal, and holds itself responsible for doing so. It is not equally interested in and responsible for the protection of the innocent? What greater wrong or injustice can be imagined than the arrest, indictment, and trial of a perfectly innocent person? It constantly happens. The whole power and machinery of the State is turned against a single individual who is often without means to defend himself or has to sacrifice all that he possesses to do so. The least that the State should do when it has mistakenly accused a man, is to assume the expense he has been put to. No one can compensate him for the distress he has suffered. But why should the state not do more than that? Why should it not have sworn officers of high character to defend as well as to prosecute? Whatever the objections, the benefits would be clear and immediate. The accused would be sure of a fair trial from which all subornation of perjury would be removed and which would be conducted without the legal pyrotechnics and sensationalism which now prevail. Objectionable personalities of counsel, unreasonable delay in obtaining juries, groundless objections to questions, misleading statements to the jury and chicane, trickery, and bribery in influencing them would all disappear. Government counsel for the accused would be just as sincere and earnest in their defence as the district attorney in prosecution, but the scales would be held evenly, and not as now, as has been said, with the entire power and weight of the State on one side. Not only would it greatly improve the character of criminal trials and promote the ends of justice to have Government defence, but it would bring another very great benefit, it would put the criminal bar out of business. Doubtless it comprises some honourable upright men, but it has as a whole always

been a reproach to the profession, and an ally to crime, shielding criminals by perjury and fraud, and necessarily living off the proceeds of their wrongdoing. It is safe to say that there would be fewer crimes committed were not criminals everywhere aware that clever, experienced, wholly unscruplous lawyers, who will stop short of nothing save their own incarceration, are always to be found to defend them by every expedient which trained ingenuity, deceit, false swearing, and jury bribing can compass. Is it not worth considering whether society as a whole would not be benefited by so changing the method of criminal trials that the Government shall be charged with the defence as well as the prosecution of accused persons, far beyond any additional expense that it might involve? If it be said that an accused person has the right to select his own attorney, it might be conceded that he should be permitted to call in assistance, but the directing of the conduct of the trial should be left in the hands of the Government attorney, insuring the elimination of the worst evils that disgrace the existing system.

ARCHIBALD HOPKINS.

UNDUE INFLUENCE AND MARRIED WOMEN.

There has been until quite recently a difference of judicial opinion on the question whether the doctrine of undue influence applies to transactions between husband and wife in the same way as it does to transactions between guardian and ward, solicitor and client, parent and child, doctor and patient, and other cases where there is some peculiarly confidential or fiduciary relationship between the parties. In cases where such relationship exists, equity, as is well known from motives of public policy, views all dealings with the utmost jealousy, and imposes upon the party occupying the fiduciary position the burden of proving that the transaction has been attended by the utmost good faith, full disclosure of all facts and circumstances, and absence of all pressure, advantage or imposition. In some cases the presumption of undue influence is so strong as to be irrefutable. Thus a solicitor is absolutely incapable of taking a gift, *inter vivos*, from a client while the relationship exists, unless it be of a trifling character, and the same rule applies to a gift to the solicitor's wife. The ground upon which transactions

between persons occupying these peculiarly confidential relationships are voided is that of fraud; not necessarily fraud in a moral sense, nor positive fraud consisting of something said, done, or omitted with the design of perpetrating what must be known to be wrong, but constructive fraud or fraud which is legally presumed from the mere fact of the relationship of the parties, though morally nothing may have been done but what was allowable and justifiable.

Turning to the cases dealing with transactions between persons standing in the relationship of husband and wife, we find that in *Nedby* v. *Nedby* (5 De G. & Sm. 383), decided in 1852, Sir James Parker held that the onus of proving undue influence lay on the wife. In that case a wife exercised in favour of her husband a general power of appointment over a reversion expectant on her own death, by the same deed assigning to him her life interest in the same fund. Fifteen years afterwards he deserted her and she filed a bill to be relieved. The Court in giving judgment for the husband said that, the power of appointment which the wife had being exercisable by deed duly executed, sufficient protection was afforded her by the formalities required for the execution of the power. But in the early cases of *Cobbett* v. *Brock* (20 *Bear,* 524), and *Parfitt* v. *Lawless* (21 W. R. 200), Lord Romilly in the former, and Lord Penzance in the latter, held that the relationship of husband and wife was one of the confidential relationships which raise certain presumptions when transactions between them are brought in question, and necessitate the proving of certain requisites as necessary to give validity to the transaction, one of which requisites was the employment on the wife's behalf of proper professional assistance.

As to the position of a purchaser or mortgagee of the wife's separate property sold or mortgaged for the husband's purposes, the law was that a purchaser or mortgagee for value, having no notice of any actual undue influence, could limit his enquiries to the question whether the wife had had professional assistance. Thus in *Cobbett* v. *Brock,* which related to a security given by a lady for the benefit of the man she was about to marry, the mortgagee having knowledge of the connection between the parties, Lord Romilly said that the mortgagee owed no duty towards the lady except to see that she had proper professional assistance. This was considered to satisfy the burden of proof that the purchaser or mortgagee was not privy to any undue influence. If the con-

test were one between the husband and the wife, then all the requisites were required to be proved by the husband, but when the security or property was parted with by the wife for valuable consideration, the case was different, unless the person obtaining the benefit of it had been guilty of or privy to the fraud. On the question whether the purchaser should see that the wife's solicitor was a different person from the husband's solicitor, the judgments in *Cobbett* v. *Brock*, and *Bainbrigge* v. *Brown* (18 Ch. D. 188), indicated that for the purpose of protecting a purchaser or mortgagee for value the lady might be treated as having proper professional advice, though the legal adviser was the same who acted for the husband. This liability of the purchaser to see that a wife has proper professional advice was also insisted upon in *Bischoff's Trustee* v. *Frank* (52 W. R. Dig. 180), where a married woman had signed a guarantee for her husband's debt, she not being advised by any solicitor, and the creditor having notice of this. Mr. Justice Wright held that the wife did not understand the effect of her signature and that the creditor was bound to see that she had professional assistance to enable her to do so.

Meantime, however, doubts had crept in as to whether the relationship of husband and wife was of this confidential character. In *Barron* v. *Willis* (1899, 2 Ch. 578), Cozens-Hardy, J., said, "it is settled by authority which binds me, although text writers seem to have adopted the opposite view, that there is no presumption that a voluntary deed executed by a wife in favour of her husband, and prepared by the husband's solicitor, is invalid." The authority referred to was the above quoted case of *Nedby* v. *Nedby*. In *Turnbull* v. *Duval* (1902, A. C. 429), the question whether a transaction between husband and wife could be impeached solely on the ground that the wife had had no independent advice was treated as still an open one. *Barron* v. *Willis* went to the Court of Appeal and to the House of Lords, but in neither Court was any reference made to the proposition laid down by Cozens-Hardy, J.

It was not until 1909 that the question was authoritatively decided. In *Bank of Africa* v. *Cohen* (1909, 2 Ch. 129), Mrs. Cohen had executed a power of attorney in favour of the bank manager, authorizing him to execute a mortgage of lands of hers in South Africa to secure her husband's overdraft. She had had no independent advice and this fact under South African law rendered the document void. Eve,

J., said: "If I were to construe the contract by the law of England I should not be prepared to hold that the mere fact that the transaction resulted in a benefit to the husband, and that the wife had no advice independent of her husband, operated to raise a presumption that the contract was void. It seems to me that the mere relationship of husband and wife does not raise, according to the present condition of the authorities, any such presumption. Upon that matter I accept the law as laid down by Cozens-Hardy, J., in *Barron* v. *Willis,* because I do not find that the explicit statement of the law by him in that case on this point was in any way dissented from either by the Court of Appeal or by the House of Lords to which the case afterwards went."

In *Howes* v. *Bishop* (1909, 2 K. B. 390), the wife signed a promissory note for the benefit of her husband, without pressure on his part, but without having any independent advice, and the Court of Appeal held her liable. Lord Justice Farwell said that he did not see how, at any rate since the Married Women's Property Act, 1882, the rule in *Huguenin* v. *Baseley* could be said to cover the relation of husband and wife. The same view was taken by the Judicial Committee of the Privy Council in the recent case of *Bank of Montreal* v. *Stuart,* and it may now be taken to be the law, that transactions between husband and wife stand on the same footing as transactions between parties having no relationship to one another, and that a purchaser or mortgagee from the wife is not concerned to enquire whether she has had independent advice, nor has the wife any right to set the transaction aside on the same ground.

FORENSIC ELOQUENCE.

By Hon. A. W. Wilkinson, of the Texas Bar.

The establishment of Courts is a step in human progress which can be taken only when society has reached a development of considerable complexity. We understand by a Court, if it is permitted one to make his own definition, that agency of civil government to which is committed the power and duty of applying to each particular controversy as it arises the rights secured and rules of conduct prescribed by the general law of the land, bringing the parties before it by due process, allowing them opportunity to be heard, determining the

matters at issue by a formal judgment, and enforcing its decrees. This presupposes, of course, a state of society in which individual liberty has so far progressed that such questions are determined by fixed law and not by the mere specific will or caprice of the ruler. Law, then, becomes a science and its administration is necessarily committed to the hands of experts; and this landmark in social evolution can hardly be said to have been established in the world till it first heard "the mighty name of Rome."

With Rome came the science of law and with that the lawyer; for the right to a hearing before a tribunal determining the claims of the citizen in accordance with fixed principles can only be effectively safeguarded by the presence of an advocate trained in those principles and skilled in sifting and ascertaining the facts to which they are sought to be applied. The poor, on the authority of the Man of Nazareth, we have with us always; and the lawyer, being generally poor, may be considered an heir to this promise. At all events, we are likely to have him so long as we have civil society, for he is its most efficient guardian. The stinging reproaches of the Saviour upon lawyers cannot be accepted as an indication that the humble philanthropists now known by that name will or should be abolished much before the millennium. It is well known that the term, as used in the gospels, referred to a class we would now call theologians. The preachers have tran lated the Scriptures and contrived to transfer the obloquy to another and an innocent profession.

We are forced to realize how great was the social advance which the lawyer's appearance in history marks when we compare the eloquence of the Athenian with that of the Roman orators. The one, though uttered in what was termed a trial and before what is called a Court, was distinctly a popular or political appeal, designed to make the body addressed feel that it would like to do the thing to which the speaker sought to persuade it. The other was the argument of one who must convince a tribunal that the judgment sought was one required by the settled principles of a land of liberty protected by law. Certainly the Greeks were great orators. Masters of all the arts, they seem to many to be our models in this, as in literature, sculpture and architecture. But if this be true, one must lay aside his modern instincts and become saturated with the spirit of the antique life to feel that it is so. To the lawyer the Greek orator violates every tradition of his training, every acquired instinct of his calling.

Between Demosthenes' Oration on the Crown and Cicero's Defence of Milo, we seem to have passed from a world governed by popular or personal despotism, benevolent or malignant as the case may be, to one where the tribunals must at least profess allegiance to civil liberty and settled rights.

For many centuries the advocate has been a familiar figure to the world, and for much of this time he has constituted the most numerous, the most highly skilled, and the ablest class devoted to the profession of influencing human conviction and action by the persuasion of the tongue. The forum has been the world's great school in this art. Sparkling or dull, eloquent or tedious, the flood of speech has flowed through the Courts for ages, and will continue to flow, whatever changes in its manner and methods the fashions of the day may impose.

Yet if we look at the collected specimens of the world's eloquence, it is remarkable how little figure is cut there by the oratory of the advocate. The productions of the clergy sleep, or diffuse sleep if disturbed, in ponderous volumes awful in number and weight. The declamations of the statesman repose in monumental quartos. Yet only here and there has there survived in print any memorial of the efforts of the lawyer for his client. There is reason for all things and must be one or several for this. Some of these I would briefly suggest.

The lawyer's speech is necessarily unwritten. The materials are furnished him in the trial and he must deal with them at once. Even in these days of stenographers they are rarely reported. Necessarily they assume a knowledge by the hearers of many things fresh in their memory—the evidence, the argument replied to—which are not to be supplied by a reader. The form which would make them intelligible to a later student would be destructive of their effect upon the hearer. They ought not to be, and seldom are, preserved. The merit of the great advocate soon becomes a mere tradition, and usually a short-lived one.

Then the lawyer's eloquence is exerted for temporary purposes only. His object is to secure a particular and immediate action from one or several persons whom he addresses; everything else is necessarily subservient to this demand. And because this is so he must deal with the minds of his hearers in such condition as he finds them. He can in only a limited degree make his work educative, profound or philosophical. Making his best effort to determine how much knowledge,

what sympathies or prejudices, what ideas of human conduct or motives he is addressing, he must consider very little the possibility of correcting his hearer's shortcomings in any of these respects, and very much the possibility of turning their shortcomings as well as their longcomings to the profit of his client. For he has no time whatever for arguing a juryman out of his previous conceptions of human nature or conduct and very little for arguing the Judge out of his misconceptions of law. "Quite so, Your Honour, but"—must be his ordinary form of response to the announcement from the bench of a view hostile to his case. A settled opinion in the judicial mind is a position not easily taken by assault, and the advocate never has time for siege operations. A turning movement is all that is ordinarly left him.

Consider how different the position of the clergyman who addresses much the same audience from week to week and from year to year and whose work is largely an educative one and cumulative in its effect; or that of the political orator who labours with other orators and with the press and with the pamphlet to secure results only at the end of a long campaign; or that of the reformer or agitator who against hope of present success, looks to the result of a lifetime spent in a cause. From this arises one of the striking defects in the training of the advocate as a public orator. Truth and soundness of argument are apt to be sacrificed to mere plausibility. "Remember that your Judges are to hear it but once," was the reply of the Greek rhetorician to the client who complained that the defence furnished him for use on his trial, and which had at first seemed so masterly, had grown, as he studied and repeated it, to sound continually more weak and inconclusive. And in truth the forensic effort which is best calculated to secure the desired object, a favourable judgment, is not at all likely to be the one which will bear being put in writing and perused at leisure.

While the tendency to study the listener and address one's argument to his supposed state of mind, the leaning toward the *argumentum ad hominem,* is the basis of much of the efficiency of an advocate, it is also a source of his weakness. Its effect upon any but the man of generous sentiments and sympathetic imagination is to make him underestimate the force of the intelligence and the desire to do right existing in his hearers. Nothing is more fatal to an orator than the feeling that those whom he addresses are not to be moved

by worthy emotions or are incapable of understanding sound argument.

Consider again that the lawyer is not bound to make his speech attractive under the penalty of empty benches which besets other public speakers. He alone can depend upon the compulsory process of government to furnish an audience. However tedious he may prove, he can, if able to secure a client, rely upon one sympathetic hearer at least, and the sheriff and jury commissioners will furnish the rest. Nor does he suffer the pangs of the man who having "hired a hall" discovers that:

> "Though his voice completely filled the house,
> It also emptied it."

For the lawyer's hearers there is no way of escape. Even though we put jurymen to sleep—an autobiographical reminiscence—a kindly Judge may sometimes request the sheriff to awaken them. Were flight open to them we would doubtless have many occasions to regret that our remarks were not more brief and pointed. As it is, the penalty for prosiness, though inevitable, is delayed; "weary lawyers with endless tongues" have become a by-word, and the temptation to slovenly and inartistic advocacy, in our off days, which we all have, is left to work its full measure of evil with our style.

If the lawyer's discipline has its dangers and defects, it has also some striking merits. By virtue of addressing most commonly, in the jury, an audience for whom he must translate into common speech the intricacies of a technical branch of learning, he is apt to be free from the grave defect of most specialists, arising from their inability to understand how much of their learning the hearer must be ignorant. At his best he is a master of the art of simplifying complicated propositions and nice distinctions. Sometimes he is liable to carry this habit over into his address to the Court. "Counsel might assume that the Court knows some law," said a snappish Judge to the advocate who was proceeding at length to enforce assent to a proposition which was fundamental. But the answer was a fair retort: "I made that mistake, Your Honour, with the Court below." Still more severe was the treatment of a similar offender by Lord Ellenborough. An eminent conveyancer, arguing a real property case, commenced his address: "An estate in fee simple is the highest estate known to the laws of England." "Stay, stay," exclaimed the Chief Justice, interrupting him, "let me write

that down." He wrote and gravely read: "'An estate in fee simple is the highest estate known to the laws of England.' The Court, sir, is indebted to you for the information." In truth, the more completely a speaker has made himself master of his subject the more difficult he may find it to get back into sympathy with the state of mind of even an intelligent man who has not given it special study. Just how much your hearer knows, how much he does not know, and where you are to start with him—how far carry him through the processes of thought by which you have reached your conclusion—is one of the nicest and most difficult things for the advocate to determine. It may be equally fatal to talk over the head of your audience, or under it, that is, if your sole desire is to convince or persuade. It is because this is most commonly the lawyer's sole desire that he is apt to be keenly alive to all the difficulties mentioned. Of other public speakers, so large a proportion are moved chiefly by desire to excite admiration of themselves that these maxims are not applicable to them. A considerable number of hearers will always admire your learning in inverse proportion to their ability to understand what you mean, and your rhetoric directly in proportion to its divergence from the ordinary forms of human speech.

The temptation before any speaker to attempt winning the personal admiration of his audience is very great, and is properly indulged where, as is frequently the case, this is the speaker's primary object. If he is concerned only for the advancement of the cause for which he professes to speak, he will, as a rule, detract from his success in this by any course which emphasizes his own personality or gifts. Wit and humour are most delightful and welcome accomplishments. We warm at once to the orator who possesses them. But few public speakers have attained reputation as humourists without having cause to lament it. They have found that, though men listened to them with delight, the power to influence their convictions was lost. There is hardly a celebrated wit among the great orators who has not borne testimony to this fact. The exceptions are those who never cared whether they did more than to amuse.

The fate of the speaker who strives for applause is much the same. The sentences which evoke thunders of cheering from an audience are those which state, pointedly and rhetorically, the very things they already believed or felt. Platitudes are far more effective for this than wisdom. No man who is presented with a new thought or with a fresh view of an old

subject will break out into handclapping over it. To even bright minds, a new idea is almost as dazing as a blow on the head. One who has received it needs time to collect his thoughts. Whenever a speaker succeeds in putting men to thinking he will be confronted by a silent and half-hostile audience. If he carries conviction it will not be by any instantaneous process. To change his hearers' way of belief, they must first have time to think it over. Shall we measure the effect of the majestic eloquence of Burke.

> "Who, too deep for his audience, went on refining,
> And thought of convincing while they thought of dining."

by the fact that he was coughed down in the House? He was listened to with weariness, and Sheridan, with delight; but which left the greater mark on the political convictions of their time? In all this, however, we are straying into the domain of eloquence generally, rather than that of the forum.

The lawyer, consumed with the sole desire to carry some specific point with his hearer, though he never doubts that oratory is an art, soon ceases to regard it as a literary performance. Rhetoric, fine language, ornament, the flowers of speech, are cast to the winds. He *must* make himself understood. He *must* get his hearers to see the facts as he sees them and feel as he feels about them. He gets a contempt for literary form. "Writing or printing," says Dr. Holmes, "is like shooting with a rifle; you may hit your reader's mind, or miss it; but talking is like playing at a mark with the pipe of an engine; if it is within reach and you have time enough you can't help hitting it." That mark the advocate must hit at any expense. Prolixity, repetition, barbarisms, inelegancies of speech, are venial faults compared with a failure to put the listeners in full possession of his positions. And it is to be noted also that his audience is neither a cultivated nor a critical one in matters of literary form, though commonly a fairly acute one in its judgment of conduct and motive.

Then there is no one who is compelled to learn more fully than the lawyer does that peculiar weakness of human vanity which prides itself upon being superior to the arts of advocacy. Jurors are full of it and Judges, though lawyers themselves, are by no means exempt. How it poisons the very sweets of success to have a Judge decide in your favour, but upon a ground different from that upon which you rested your case; and how many Judges are given to determining the issues upon a point which "counsel seem to have overlooked." But the

jury—Beware, young man, of eloquence. Beware of saying anything bright. Distrust anything which you think may excite admiration of yourself. Rest assured that you have wrought your masterpiece of advocacy only when, in a suit you thought doubtful, the jury bring you in a wholly favourable verdict, and go away with the impression that, throughout your handling of the case, you have done nothing smart and said nothing bright, have proven yourself utterly commonplace, but have won just because you had a case that no fool could have lost.

A familiar anecdote of Scarlett, the great English advocate, is in point. A countryman who had been serving upon the jury and had rendered verdict after verdict for the side he represented, was asked what he thought of the lawyers engaged. "That lawyer Brougham," he said, "is a wonderful man; he can talk, he can; but I don't think anything of lawyer Scarlett."

"Why," said the other, "you have been giving him all the verdicts."

"Oh, there's nothing in that," was the reply. "He's so lucky—he's always been on the right side."

What infinite pains, what delicate tact, what nice perception is demanded of him who would convince the reason without appearing to argue; who would touch the passions while appearing to invoke the cold dictates of reason; who would melt others with the pathos of a situation without apparent consciousness of its pathetic significance; whose recital of wrongs can fire them with the indignation which he seems to deprecate—like the horseman described by Sheridan:

> "While his off heel, insidiously, aside,
> Provokes the caper which he seems to chide."

Listen, for example, to the closing appeal of that prince of advocates, Curran, in the case of *Hevey* v. *Sirr*, an action for false imprisonment, significant of the state of liberty in Ireland during the political troubles of his time. Could the efforts of any orator who appeared to "turn himself loose" make the blood of an Irish jury boil as it would at this affected repression of sentiment and feeling through which is permitted to shine the white heat of volcanic indignation?

"In every point of view, therefore, I recommend you to find and to find liberally for the plaintiff. I have founded my advice upon the real circumstances of your situation; I have not endeavoured to stimulate you into any silly hectic of fancied liberty. I do not call upon you to expose yourselves

to the affectation of vindicating the cause of freedom and humanity; much less do I wish to exhibit ourselves to those whose property we are as indignant and contumacious under their authority. Far from it; they are unquestionably the proprietors of us; they are entitled of right to drive us and to work us; but we may be permitted modestly to suggest that for their own sakes and for their own interest a line of moderation may be drawn. There are excesses of infliction that human nature cannot bear. With respect to her western negroes, Great Britain has had the wisdom and humanity to feel the justice of this observation, and in some degree to act upon it; and I have too high an opinion of that great and philosophical nation not to hope that she might think us not undeserving of equal mildness; provided it did not interfere with her just authority over us. It would, I should even think, be for her credit, that, having the honour of so illustrious a rider, we should be kept in some sort of condition somewhat bordering upon spirit, which cannot be maintained if she suffers us to be utterly broken down by the malicious wantonness of her grooms and jockeys."

In the days when the writer, then a growing lad, began to dream of the law as a career and to hang around the Courts, a controversy between two great railway companies brought to his village, among the counsel whose faces were familiar there, a genial looking, bald-headed stranger, of whom rumour spoke as a "rattling good lawyer," who quickly got acquainted with everybody, and to whom everyone who liked a good story or a witticism gravitated during any recess of the Court. He disposed of the great case in which he appeared, for the time, at least, in a speech upon a demurrer, of five or ten minutes' length, which seemed to be merely a pleasant colloquy between himself and the Judge, in the style of two neighbours talking about a business affair across the table. His name was not then, as in a few years it came to be upon everyone's tongue; and the youth certainly had not the faintest suspicion at the time that in hearing Robert G. Ingersoll at the bar he had been listening to one of the foremost of living American orators.

It is just at this point that many lawyers at the present day are likely to make a mistake. In their disgust at flamboyant rhetoric and vociferous elocution they imagine that advocacy is not an art at all. It should be all beautiful simplicity and trust to nature. They see the greatest advocates winning their causes by a style of address so simple, so natural,

so smooth in manner that it looks easy. But it is the height of art to conceal art. No matter how easy it looks, be assured that no one ever mastered such a style except at the expense of infinite pains and study and anxiety about his manner of speaking. The "natural born orator" bellows and paws the air and tears his shirt—rends his apparel, he would prefer to say. The cultivated speaker will suggest that two and two make four, and you feel that his treatment of the proposition is adequate. The "natural born orator" must declaim: "Now, Your Honour, and gentlemen of the jury, I venture the assertion, that the sum of two and two always is, and must be, neither more nor less than four. Will this be controverted by my opponent? I pause for a reply."

It is well for us, however, not to be hypocritical about the sort of oratory that the masses admire and we do not. The insisting at great length and in exuberant rhetoric that two and two make four, is distressing to the judicious, but is one of the most efficacious of the mere tricks of advocacy—especially where there is no reply to the speaker. An ingenious misstatement of an adversary's position is never so effective as when followed by a detailed, declamatory and passionate refutation of the things that no one ever asserted, and insistence, backed by elaborate argument, example and illustration, upon propositions that no one dreams of refuting. The uncritical hearer will be slow to believe that all this storm of verbosity could have arisen unless some malignant opponent had declared that two and two made fifteen. Some minds are so constituted as to admire most an argument which is absolutely unanswerable. But there are few questions which are not debatable, and most arguments which have this appearance of finality will be found to have begged the question.

All this does not in the least imply that oratory is a matter of art and training simply. The finest cultivation cannot serve to make long tolerable the speech of one who has nothing to say; and for the qualities which grace and adorn the weightier matters of discourse, and give them the power to move the hearer, for the pathos and sentiment, the touch of the imagination, the wit and humour, the perception of those delicate boundaries between the sublime and the ridiculous which only the saving grace of a sense of humour can confer—these things must for the most part be numbered among the gifts of nature. Even as to the weightier matters of reasoning, it remains largely true that:

> "All the rhetorician's rules
> Teach nothing but to name his tools."

Such a statement will doubtless awaken protest from the whole tribe of scholasticism which parades under the banner of "Modern Scientific Method"; for the cardinal principle of their faith is that it is flatly impossible for a being not trained in their system to draw, except by accident, a correct inference from facts. Certainly the "scientific method" which, since the days of Bacon, has steadily gone on from one glory to another till it seems to overshadow the whole intellectual heavens, has taught its followers to avoid some flagrant errors of induction once common. But its triumphs have been won less from any improvement in our powers of reasoning than from patient and systematic accumulation of the facts from which our inductions are to be drawn.

On the other hand, there are philosophers who maintain, and with a great degree of plausibility, that cultivation, even in the methods of logic, has added little to the powers of the human mind. That men of ancient times reasoned, and illiterate men of the present day continue to do so, as vigorously and accurately as the most learned moderns—if reasoning from the same premises; and some assert the paradox that training in formal logic and in the mathematics may even weaken one's power to reach sound conclusions in matters when only probability or moral certainty can be hoped for.

Of all men who make a profession of persuasion by reason, the lawyer comes closest to and observes with most intense interest the intellectual processes of the ordinary citizen. Of course there are lawyers, as there are men in every calling, who cannot reason and would not recognize an inference if they met it in the road. There is as, before remarked, some tendency in the circumstances under which the lawyer speaks to lead him to place too high a value on mere plausibility. But the stronger advocate a lawyer is, the more likely is it that he will have a wholesome respect for the reasoning powers of the average juryman. The arguments which he has himself recognized as the best and soundest he has generally found to be the most convincing.

Having dwelt upon the disadvantages under which the advocate labours it is to be remarked that he possesses one great advantage over most orators in that he is very much in earnest and able to speak usually the things which he believes and in the tone of sincere conviction. This sounds like a paradox and may make members of the other professions smile. Every other orator professes to speak his own sentiments and to utter

them out of his conviction that, in the interest of the world, they ought to be heard. The advocate alone is a free lance, an avowed mercenary, a confessed hireling, whose tongue is, with some reservations for the sake of decency, for sale in the open market. How can he appear to speak with any honest indignation? Must not his fire and feeling be as purely artificial as that of the actor who mouths fictitious sentiments before a scene of painted canvas?

This is a mistaken view. Lawyers generally believe, often passionately, in the positions which they maintain in Court. Those who doubt this fail to make sufficient allowance for the power of the human mind to persuade itself of the justice of its conclusions, if it does not too long and seriously examine into their soundness. When the subject on which one speaks is a new one each day, there is not only some degree of freshness involved in the very change, but the speaker cannot devote time enough to any problem to get out of love with his convictions, and permit them to grow stale. Convictions are most fascinating when first captured, and are then held with the greatest intensity. It is a curious fact in the barrister's experience that he seldom finds himself trying a case the second or third time quite as well as he did the first.

Deliberation makes us begin to doubt everything. The politician has, in early life, adopted, or perhaps inherited, a set of party principles; the theologian has come, in the same way, into possession of a creed. The reasoning by which their conclusions were supported looked at first beautiful and irrefutable. But the foundations of belief in any of our cherished intellectual possessions are found, when we come to examine into them too long and curiously, unexpectedly insubstantial. What looked like the everlasting granite of demonstration seems now mere vapory conjecture. We are commonly cocksure only of those things to which we never gave any profound study.

But statesman, theologian, and nearly everybody but lawyers find their powers of advocacy harnessed each into the service of some special set of views which practically they must drag on for life. Once they have believed in them intensely: they probably still believe in them, in a way. But sooner or later they must begin to suspect that nothing is certain in this world or about it—not even its objective existence; and then, of course, the advocacy of party or of creed or of cause must lack conviction and be compelled to simulate it. It is a melancholy thing to see how all of us who took things

seriously and tried to hold and stand for convictions, find ourselves, in later life, entangled in the claims of various causes and organizations to which we profess a loyalty which has grown lukewarm and full of misgivings. We go on shouting empty catch words and battling for meaningless flags—things which have lost their significance as symbols of vital belief. Let us venture to hope that they never lose all significance; when they have wholly done so the man is dead. But to the mature and thoughtful mind they come to stand for something so different from current conceptions that a sincere utterance of one's belief may seem, not support of his cause, but hostility to it.

Fortunate, then, is the lot of the advocate, who lacks time to become disenchanted with his theme. Though he appears as the mere hired retainer, he generally believes sincerely in his points if not in his cause. The laity do not understand this, and are prone to regard him as a mere actor, simulating passionate conviction, at the very time when he most believes what he says.

If the qualifications for making a great orator sound discouraging or prohibitive, the aspirant to the honours of the forum, at any rate, may comfort himself with the thought that very likely he is better off without such accomplishment. The great speech demands a great theme and a great occasion, and these come rarely. Most of the affairs of life, even those which require public discussion, are comparatively trivial or prosaic or sordid. The grand manner is appropriate only to occasions which will present themselves but few times in a man's life. One's style of speech, and he can usually have but one, will best be after the fashion demanded by nine hundred and ninety of the thousand occasions on which he may be called to employ it. The easy, unimpassioned colloquial flow is not so inappropriate to great themes as is the "small pot soon hot" eloquence which Emerson deprecates, the hissing indignation and flaming wrath, so often applied to issues of no greater dignity than the title to a bull-calf or the boundary line between contiguous farms.

A fatal facility of speech is one of the most dangerous qualifications with which the young advocate can be endowed. It discourages hard effort and tends to shallow prolixity. The number of great orators who have attained their triumphs over apparently insuperable obstacles of stammering elocution, stage fright and ignominious early failure may furnish not only encouragement to the determined but derided youth, but

warning to the self-confident and ready one. Stuttering Jack Curran is the world's standard example. The great thing after all is to have something to say—some resources of reason and feeling and imagination without which mere words become as exasperating to the hearer as the clatter of a loose shutter in the wind. And ready speech is not likely to be a native characteristic of the thoughtful mind. There is sense as well as wit in the observation of Dean Swift: "The common fluency of speech in many men, and most women, is owing to a scarcity of matter and a scarcity of words; for whoever is a master of language and has a mind full of ideas will be apt in speaking to hesitate upon the choice of both; whereas common speakers have only one set of ideas, and one set of words to clothe them in, and these are ready at the mouth; so people come faster out of a church when it is almost empty than when a crowd is at the door."

Another word of warning may be suggested to the would-be advocate. I have heard General Robert E. Lee credited with the saying that a commander of troops should be a man who naturally loves a fight. Otherwise his shrinking from the horror of it will certainly lead him to avoid action at times when his judgment ought to tell him to seek it. The proportion of lawyers who have found the trial of litigated cases with their uncertainties and the sharp collisions of interest and feeling which they involve, distressingly painful is greater than is generally supposed. If you are of this temperament avoid the profession by all means. Some have overcome it by practice. Upon some it remains, and becomes a growing horror. If you don't love a fight, you will be very apt not to love the law. The shrinking from entering upon trial, the dread of its responsibilities, the apprehension for its results have been, with many practitioners, sufficient to render their calling positively distasteful and odious; and among the number of these might be counted many whose bearing in the Court room and whose success as advocates were such that none would suspect their inward reluctance at entering on its controversies.

But after all there is more or less of this in every calling. Society is organized upon the basis of warfare. Once it was military; now it has grown to be largely economic. It is our business in life to prey upon and to struggle with one another. Some philosophers would have us believe that it is only through this struggle for existence that we have risen to be what we are, and that without it we must retrograde. The

first half of the proposition we may accept without necessarily agreeing with the second. Warfare has been, through much of the past, our natural state—even the natural state of all animate creation. "The may-fly is torn by the swallow; the sparrow is speared by the shrike; and the whole little wood where I sit is a world of plunder and prey." But at least we may trust that this is not to be forever. The fact that all that is highest and best in us revolts against our conditions should help us to this hope. If the state of our social organization is such that the best and noblest man we can produce, the gentleman, the scholar and the Christian, finds himself by the possession of these high qualities unadapted to the practical uses of the world and needing some fibre of coarser grain in his structure to make him fit for them, then the social organization needs to be made over and rendered a proper medium for the cultivated Christian gentleman to live in.

We find a great many admirable things in the lawyer. It is difficult to see how the world can get along without him at present. But the world has always felt that things will never be quite right till he has been got rid of. All the ideal commonwealths of the philosophers, so far as I remember, have dispensed with him. May he not, himself, be permitted to join in the expectation of a good time coming when his calling shall have become superfluous? Indeed, he will perhaps feel more keenly than any one what a happy time that would be.

How may one know, at the outset, that he has in him the making of an advocate? He can not know; and he can still less depend on the judgment of his friends than upon his own. It is the way of all art. There is no guaranty conveyed by one's inward conviction, however burning it may be. Are not the schools and the studios filled with painters determined against every discouragement that they will succeed, and doomed forever to produce only atrocities which never reach the walls of the exhibitions, much less the collections of purchasers? Are not the futile poets who beset the magazines with lines of undeniable scansion and rhythms of unimpeachable correctness, but lacking only "the light that never was on sea or land," the jest or terror of the sanctum?

It is one of the compensations of the lawyer's lot, that in adopting his profession he has not staked his whole life on the conviction that he is a man of genius. He who chooses the paths of literature or of art confesses by the act that his choice is dictated by the inward conviction that there is something in him; for failure here means lamentable disappointment.

Neither dealers nor exhibitions nor collectors afford comfort for the fairly good artist. Neither gods nor men nor booksellers tolerate the "tolerable" poet. And though, just now, the intolerable novelist seems to mount to the hundredth edition, we may hope that the frenzy is the brief fashion of a stage of half education which we shall possibly outgrow—a phase of the printing business incident to the evolution of a vast public who have been taught to read and discouraged from thinking.

But there will always be a steady though limited demand for tolerably good lawyers and advocates and their lot in life need not be an unhappy or disappointed one.

Though he have no touch of the genius without which no man ever becomes a great orator, there is scope for moderately high ambition in the rewards which await the good and forcible advocate. And a fair degree of attainment in this line is within the reach of any person of ordinary good sense who will diligently and modestly study and practise the art. It is not easy; but any one of reasonable intelligence who will set himself to the task with determination can acquire the power to speak smoothly, clearly and with some degree of effectiveness.

There is nothing which rewards the labour bestowed on it with more satisfactory results, for when done successfully it is the most fascinating thing in the doing that life's experience can furnish you. To watch the faces of one's hearers and catch in their countenances the response of the mind to the things you are saying—to feel that you are master of your subject and are followed with close attention and appreciative sympathy by those to whom you are striving to convey that mastery, is one of the triumphs of the intellect. But, on the other hand, a sensitive speaker is equally sensitive to his failure and to his success, and must often endure the mortification of feeling that he is talking weakly and vaguely and is being followed with neither sympathy nor understanding. And here lies one of life's compensations, for after all the fools and dullards are the happiest of men. No one, probably, gets more satisfaction out of his own oratory than the stupid man who can prose on interminably without the faintest perception that he is boring his audience—nay, in the blessed and child-like consciousness that he is enlightening and delighting them. Study, then, diligently the art of oratory. Its rewards, in inward satisfaction, will be great if you succeed.

RECENT DECISIONS OF THE PRIVY COUNCIL.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(LORD LOREBURN, L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW and LORD ROBSON.)

[MAY 10TH, 1911.

THE CANADIAN PACIFIC RAILWAY COMPANY v. THE CORPORATION OF THE CITY OF TORONTO AND THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

Canada—Railway—Jurisdiction of Railway Board—Appeal to Privy Council—Competency.

An order made by the Railway Board of Canada ordering two railway companies to construct an elevated viaduct in the city of Toronto held to be *intra vires* and valid.

An appeal lies to the Judicial Committee of the Privy Council from a decision of the Supreme Court of Canada on an appeal thereto from an order of the Railway Board of Canada.

Decisions of the Supreme Court of Canada (42 Can. S. C. R. 613), affirmed.

These were consolidated appeals—the first from a judgment of the Court of Appeal of Ontario of February 17th, 1907, confirming a decision of Mr. Justice Anglin; and the second from a judgment of the Supreme Court of Canada of February 15th, 1910.

Sir Robert Finlay, K.C., *Mr. E. Douglas Armour,* K.C. (of the Canadian Bar), *Mr. Angus MacMurchy,* K.C. (of the Canadian Bar), and *Mr. Geoffrey Lawrence* appeared for the appellants; *Sir Edward Carson,* K.C., *Mr. H. H. Dewart,* K.C. (of the Canadian Bar), and *Mr. W. Boustead,* for the Corporation of Toronto.

The arguments were heard on March 23rd, 24th and 25th, before a board composed of the Lord Chancellor and Lords Macnaghten, Atkinson, Shaw and Robson, when they intimated (as reported in the *Times* of March 27th), that they

* 27 T. L. R. 448.

would humbly advise his Majesty that the appeals should be dismissed.

Lord Robson, in giving (for Lord Atkinson) their Lordships' reasons for the decision at which they arrived, said:—By the first of the judgments appealed from a certain order of the Railway Committee of the Privy Council of Canada, dated January 14th, 1904, and purporting to be made under the 238th section of the Canadian Railway Act, 1906, whereby the two railway companies, the Canadian Pacific Railway Company and the Grand Trunk Railway Company of Canada, were ordered to carry a bridge over their respective lines at Yonge street in the city of Toronto, called the Yonge street bridge, was held to be *intra vires* and valid, and by the second an order, dated June 9th, 1909, of a certain body called the Railway Board created by a statute, styled in the case of the appellants, "the viaduct order," whereby the two companies were ordered, amongst other things, to construct an elevated viaduct some miles in length for the purpose of carrying two of the tracks of each of their respective lines through the said city, was also held to be *intra vires* and valid. The second of these orders—namely, "the viaduct order," practically supersedes the first, inasmuch as the bridge at Yonge street will not be required if the viaduct be constructed.

It is scarcely necessary to point out that their Lordships are not concerned with the ethics of these orders. They are not called upon to express any opinion whatever as to whether the orders are just or unjust, oppressive or the contrary. The Legislature of Canada has thought it right to confer on these two bodies, the Railway Committee and its successor the Railway Board, wide powers. If these powers be abused, or be found to be in their exercise hurtful, the Legislature which conferred them can withdraw or restrict them, or subject their exercise to control. But the only questions with which their Lordships have, in this case, to deal, in addition to that of competency of the appeals to be presently disposed of, are first, whether the Committee and the Board had, under this section of the Act of 1906 as amended by the Canadian Railway Act of 1909, jurisdiction to make the order which they have made. And, secondly, the question whether a certain statute of the Parliament of Canada (56 Vict. 48), validating a certain agreement entered into by the two railway companies aforesaid and the corporation of the city of Toronto, styled the Tripartite Agreement, and authorizing certain works to be executed upon the said railways, which, being executed,

have brought the said lines into their present state and condition, is a special Act within the meaning of the said Act of 1906, and if so, whether its provisions are to prevail over those of the section of this latter statute under which the impeached orders purport to have been made.

As to the preliminary point, that an appeal does not lie in this case from these judgments of the before-mentioned Courts, it is to be borne in mind that these are appeals to his Majesty to exercise his Royal prerogative as an act of grace. In the case of *Theberge* v. *Laudry* (2 A. C. 102), Lord Cairns, though he held that from the peculiar nature of the jurisdiction exercised by the tribunal in that case—the trial of an election petition—an appeal to the Crown did not lie, yet at page 106 he is reported to have said that he did not desire to imply any doubt whatever as to the general principle that the prerogative of the Crown cannot be taken away except by express words. In *Cushing* v. *Dupuy* (5 A. C. at page 409), the Act there under consideration, a Bankruptcy Act, affecting ordinary civil rights, contained the words: "The judgment of the Court to which under this section the appeal can be made shall be final." Yet it was held that these were not sufficient to derogate from the Royal prerogatives. *Moses* v. *Parker* (12 The Times L. R. 254; (1896) A. C. 245), was a case somewhat resembling *Theberge* v. *Laudry*. It was there held that as the tribunal from which it was desired to appeal was expressly exonerated from all rules of law or practice, and certain affairs were placed in the hands of the Judges as the persons from whom the best opinions might be obtained and not as a Court administering justice between the litigants, such functions do not attract the prerogative of the Crown to grant appeals. In the case of *In re the Will of Wi Matua,* deceased (24 the Times L. R. 834 (1908) A. C. page 448), in which the statute then under consideration declared that the decisions of the Native Appellate Court should in litigation in the region of probate be final, it was held that the Royal prerogative was not excluded.

The Railway Board is constituted by the Railway Act of 1906 (R. S. C. c. 37). By section 26 very extensive powers are given to them as to the orders they may take affecting the rights and obligations of railway companies. For the purpose of exercising their jurisdiction they are a Court of Record, and have all the powers of a Superior Court. By section 56, sub-section 2, an appeal, if allowed by a Judge of the Superior Court, lies to that

Court from the Board on any question of jurisdiction, and by sub-section 3, on any question of law by leave of the Board to the same tribunal. By sub-section 5 of the same section the Supreme Court is to certify to the Board its opinion on the question of jurisdiction or of law so referred to it, and the Board is to make an order in accordance therewith. And by sub-section 9 it is provided that the order of the Board is to be final, and is not to be restrained or removed, questioned or removed by prohibition, injunction, &c.

It is argued that, as the Supreme Court only certifies its opinion, the order made is the order of the Board, and this is declared to be final. But a Court of Appeal unless empowered to make such an order as they think the Court appealed from should have made, can only certify its opinion to the Court appealed from, leaving it to the latter to act upon the opinion so expressed, and to make the proper order. That is merely machinery, however. Moreover, it is expressly provided by sub-section 3 of section 56, that the Court is to determine the questions of jurisdiction, and of law referred to it. These determinations are decisions of that tribunal, and in their Lordships' opinion the language of the section is not sufficient, according to the authorities cited, to take away the prerogative of the Crown. They therefore think that an appeal to the Crown lies from the judgments appealed against.

The question of the jurisdiction of the Committee or the Board to make the orders complained of depends in the first instance on whether these respective lines of rails are laid "upon or along or across a highway," as that word is defined by section 2 sub-section 11, of this statute of 1906. That is the condition precedent which must be satisfied before jurisdiction attaches. Now, a highway is defined to include "any public road, street, lane, or other public way or communication."

The material facts necessary to be considered in order to determine the question of the jurisdiction of the Committee and Board to make these orders are as follows:—The city of Toronto lies along the northern shore of that part of the Lake of Ontario called the Harbour of Toronto. Its streets, run, for the most part, parallel to the shore, east and west, and at right angles to the north and south. Of the first class, the nearest to the shore was Front street. In the year 1840, before either of the railway lines was constructed these cross streets ran down from the north and debouched upon Front

Street which it was only necessary to cross to gain ready access to the harbour.

On February 21st, in that year the Crown by patent, granted to the city of Toronto all the land lying between the top bank of the harbour and the water's edge within the limits therein mentioned, and also granted certain lands covered with water situate in front of the city of Toronto, called water lots, therein described, to hold in trust for the public purposes of the city, and from time to time to lease the said water lots and strips of land for terms not exceeding 50 years; reserving such reasonable rent as the Mayor, Aldermen, and Common Council of the city should order and direct, subject to certain covenants, to fill up the same and build thereon, and also to make an esplanade running east and west. The portions of the subaqueous soil of the harbour opposite the termination of the streets running north and south were reserved to the Crown. These inlets, save to the extent hereinafter mentioned, have never been built upon, and the water of the bay still flows over them. They are called slips. The esplanade not having been built by the Corporation of Toronto, an Act of the Province of Canada was passed on June 15th, 1853, enabling them to contract with any person or persons who might be willing to construct it in front of and upon the water lots described in the letters patent.

In exercise of this power the Corporation entered into a contract, bearing date August 30th, 1856, with the Grand Trunk Railway Company, for the construction of an esplanade along the water front, 100 ft. wide, upon the line originally designed in the patent of 1840. The specification annexed to this agreement contained the following three passages:—

"Streets—From Brock street to Berkeley street inclusive, there are to be 16 streets graded so as to connect the esplanade with the natural shore of the bay."

"Brock street, Peter street, and John street will have to be graded to the form of inclined planes of no greater degree of inclination than 1 ft. rise in 16½ ft. horizontal."

"All the other streets will be formed by level embankments of corresponding height to the esplanade, and extending from its rear line to junction with the several streets as they now slope down to the water."

The map referred to in this agreement, No. 4, clearly shews that the line of the shore of the harbour opposite Front street was irregular; that many wharves had been built along it jutting out into the lake far beyond the line of the pro-

posed esplanade, and that land covered with water intervened between the line of the proposed esplanade and Front street. This contract was admittedly carried out, and the esplanade constructed under it. The last mentioned space was filled up and the cross streets coming from the north, which theretofore debouched on Front Street, were prolonged across this newly-formed land and made to debouch on the esplanade. The lines of the Grand Trunk Railway were laid along the esplanade on the level, under the authority of a statute of the province of Canada passed in the month of June, 1857 (20 Vict., c. 80), a space 40 ft. wide from its southern side, being reserved for that purpose. By section 7 of this Act lands or property belonging to the Crown, as the soil and bottom of all these great lakes in Canada do, are exempted from its operation.

By a statute of later date, March 18th, 1865 (28 Vict., c 24), it was enacted that the esplanade should be deemed a public highway, and the corporation were empowered to grant to the Grand Trunk Railway and two other railway companies named therein a right of way over an additional 12 ft. 6 in. of its surface on the southern side. But it is by section 3 expressly declared that nothing contained in the Act should be construed to grant to these railway companies, or any of them, an estate in fee in the esplanade or any part of it. In pursuance of this enactment the Corporation of Toronto, by deed dated April 19, 1865, granted to the Grand Trunk Railway and the two other companies named therein, the Great Western and Northern, a right of way over, upon and along 12 ft. 6 in. in width of the south part of the Esplanade street adjoining the northern limit of the south 40 ft. thereof, and extending along Esplanade street from York street to the eastern limit of the esplanade, for railway purposes, on the terms and conditions in the said statute and the agreement already mentioned set forth, subject, however, to the condition that none of the railway companies should block up or obstruct any of the public streets or crossings leading over the railway tracks to the wharves or water frontage with any trains, cars, or other railway appliances. The above mentioned condition precedent was, therefore, as to this line admittedly satisfied.

The main point of controversy is—Has it been satisfied in respect to the other line? It is clear from the provisions of the before mentioned statutes, and from the contents of

the several documents referred to, that up to this period, at all events, whatever right the public may have had to pass down the several cross streets already mentioned, to traverse Front street, and thus gain access to the harbour and its waters, was preserved to them unabated. According to the parol evidence in the case this right has up to the present been freely, openly, and continuously enjoyed without let or hindrance by members of the public, and, most important of all, having regard to some points relied upon by Mr. Armour in his able argument, has been sedulously guarded by the Legislature as well as by the Ministers of the Crown. The fact that a member of the public had to traverse the made dry land to the south of Front street and cross the esplanade before he reached the shore of the harbour instead of reaching it as theretofore almost directly from that street itself could not alter the nature or extent of his right of access to the waters of the lake. After the construction of the esplanade some of the owners and lessees of the water lots, filled up their lots, converting them into dry land, and built piers and warehouses upon them; the spaces, however, immediately opposite the several cross streets which would have formed the sites of their prolongations into the harbour were never granted away by the Crown, but were kept open and used by the public as a means of access to and from the waters of the lake.

Things admittedly remained in this position till the year 1887-88, when the Ontario and Quebec Railway sought authority to construct, and subsequently actually constructed, the branch line called the Don Branch connecting the City of Toronto with their main line. It was subsequently leased to, and is now worked by, the Canadian Pacific Railway Company. This branch, not being more than six miles in length, sub-section 18 of section 7 of the Railway Consolidation Act of 1879 (42 Vict., c. 9), applied; so that it became necessary, before the line could be made, that the Governor-in-Council should not only approve of its location, as shewn upon plans deposited in his office, but should also sanction the making of the line, as well as the appropriation by the promoters of the lands necessary to be taken for its construction. The Governor-in-Council made an order, dated January 25, 1887, approving of the location of the line and sanctioning the making of it, but not containing any express provision for the appropriation of any lands belonging to the

Crown. This order was followed by a statute passed May 22, 1888 (51 Vict., c. 53), authorizing the construction of the line and extending the time for its completion to three years, and enacting that the company should not be restrained by anything contained in it from entering Toronto by the said branch, or from expropriating the lands necessary to build their branch.

From the map No. 7 referred to in this order it appears that the branch line was to be carried on an embankment abutting on the southern side of the esplanade, resting on the subaqueous soil of the harbour, and consequently upon the shore ends of the water lots and of the slips. The portions of those water lots to be acquired are marked in red, while the inlets, 12 in number, each 66 ft. wide, from York street to Berkeley street, opposite the several cross streets, including Yonge street and Bay street, are coloured white up to the side of the esplanade, and bear the names of the streets to which they are opposite. They are thus evidently treated as the sites of the contemplated prolongation of the streets, the names of which they bear. It was the location and making of the line so delineated and described which the Governor-in-Council by his order of January 25, 1887, sanctioned. By an agreement dated March 15th, 1888, five weeks after the Governor-in Council had thus sanctioned and approved of the making of the branch line, the Crown provided for a further encroachment on the harbour, and agreed to grant its soil and bottom to the corporation up to the new windmill line, expressly excepting, however, thereout "the strips of land, and land covered with water which coincide with the southward prolongation of all the streets now running to the south front of the esplanade."

In the face of these documents Mr. Armour contended that the Governor-General-in-Council had by expressly sanctioning on January 25, 1887, the construction of the branch line, and approving of its location, impliedly sanctioned the acquisition by the Ontario and Quebec Company of the fee simple of the portions of the subaqueous soil of the slips on which their embankment was built. and that the public right of access to the remaining portion of the slip was on the authority of the *Corporation of Vancouver* v. *the Canadian Pacific Railway* (23 Supreme Court Reports, p. 1) thereby destroyed; and further that as the company are prohibited from alienating the land so acquired in fee, they

could not dedicate anew to the public a right of way over those lands, and that, therefore, any public right of way which might theretofore have existed could not be recreated.

In their Lordships' view the facts do not sustain this contention, and the decision in the Vancouver case, which was based on the terms of a particular statute differing entirely from those contained in the statutes referred to in this case, does not apply. Moreover, in their Lordships' opinion the words "public communication," as distinguished from "public road, street, lane, or public way" must have been introduced into the definition of a highway to meet a case where the members of the public use or traverse a particular route as a means of arriving at, or returning from, a particular place, whether they do so as of right or by leave and license, express or implied. These words, they think, do not authorize a trespass. but short of that they apply to an actual user by the public whether as of right or not. Indeed, it is but natural that this should be so, inasmuch as the action both of the Committee and the Board is directed to promote and secure the convenience and protection of the public, and the danger to the public is the same whether its members traverse the lines of a railway upon which trains run, as of right, or by express or implied permission.

As far, then, as the highway point is concerned their Lordships are of opinion that the Railway Committee and the Railway Board had jurisdiction to make the orders they respectively made. The point of law arising on the application of section 3 of the Railway Act of 1906 to the Tripartite Agreement of July 26, 1892, and the statute confirming it, 56 Vict. ch. 48, passed April 1, 1893, remains for decision. This agreement provided, amongst other things, for the closing and diverting of certain streets in the said city; for the construction by the companies of two bridges over both the railway lines at York street and John street, and the maintenance of these bridges as public thoroughfares; for the extinguishment by the city of the existing right of the public (if any) to cross the esplanade at the point where York street, as diverted, touches it, except at Bay street; for the cost of the maintenance and construction of certain level crossings over both these lines of rails opposite some of the cross streets. for the abandonment of the site the companies had acquired for their Union Station, and the substitution of an alternative site and for the construction of the works necessary to effect these several changes.

Article 21 of the agreement is to the effect that "except as therein otherwise provided the provisions of the Railway Act and the Municipal Act so far as application to anything herein contained shall form part of this agreement as if expressly set out therein." The Railway Act referred to is, of course, the Railway Act of 1906. The assumption on which this agreement is based is obviously this, that both the lines of railway should continue to run on the level as theretofore. The agreement could not of itself confer on the companies power to carry out the many works, and make the many alterations contemplated by it. It was necessary to obtain parliamentary powers for that purpose. And accordingly this Act of the Dominion Parliament, 56 Vict., c. 48, was obtained, ratifying and validating the agreement, enacting that all the works done, or to be done, under it, as well as those affected by it, were works for the general advantage of Canada, and further enacting that each of the parties to the agreement "might do whatever is on its part necessary in connection with any of the said works in order to carry out and give effect to its undertakings as embodied in the said agreement"

It was by this statute that power and authority were conferred upon the company to carry out the works specified in and operate their lines in the manner contemplated by, the Tripartite Agreement. Their Lordships are, therefore, clearly of opinion that this Act was a special Act within the meaning of the section 2, sub-section 28, of the Act of 1906. But though the Act empowers the companies to construct their works and operate their railways in the way proposed, it does not enact that the works it authorizes shall, if made, never be altered, no matter how surrounding circumstances may change. To give to it such a construction would result in paralysing both the committee and the Board, and in defeating entirely the object of this remedial statute, the Railway Act, of 1906.

It has been urged that the work contemplated by the Viaduct Order can only be carried out at enormous cost, and would, if carried out, amount to a physical transformation of the whole system of these two railways, over about five miles of their length, two of each of their four tracks being elevated into the air, and two others left at their former level, but blocked and interrupted so as to be of comparatively little use for through traffic, and that the access of trains to the contemplated station would be cut off or impeded. This

may all well be, but the answer to it is (1) that the words "or may order that the railway may be carried over, under, or along the highway" have been introduced into section 238 by the amending Act of 1909, as if to meet such a case as this, and to confer upon the Board the powers they have exercised; and (2) that unless restricted by the provisions of section 3 of the Act of 1906, the Board where it has jurisdiction, may make any order of this kind which it deems expedient for the protection, safety, or convenience of the public.

Now section 3 enacts that where the provisions of the Act of 1906 and of any special Act passed by the Parliament of Canada relate to the same subject matter the provisions of the special Act so far as is necessary to give effect to it are to be taken to override the provisions of the Act of 1906. If the subject matter of the special Act and that of section 238 of the Act of 1906, as amended, were the same, then there would undoubtedly be a conflict between the two enactments; but they are not the same; the specified works, the power to construct and use them, form the subject-matter of this special Act. The subject-matter of section 238 is the control of the Board over the railway companies, and the power conferred upon it to require the companies to construct such works as it may deem necessary for the protection and convenience of the public. These are wholly different matters. The two statutes can stand together. Effect can be given to each. There is no conflict between their provisions, such as is contemplated by section 3. Section 3 consequently does not restrict in any way the power of the Board; and the question of law referred to the Supreme Court, like that of jurisdiction, was, therefore, in their Lordships' view, rightly decided by the Courts whose decisions have been appealed from. The appeals should accordingly be dismissed and the appellants will pay the costs.

Solicitors, *Blake* and *Redden,* Freshfields.

The Library

"And what of this new book?"—*Sterne.*

"Men disparage not antiquity who prudently exalt new enquiries."
—*Sir Thomas Browne.*

Public Companies. A Treatise on the Law and Practice relating to the Formation and Flotation of such Joint Stock Companies Limited by Shares as invite the Public to Subscribe for their Capital, including an appendix of the Rules and Regulations of the Stock Exchange relating to Special Settlements and Quotations. By B. O. Bircham of the Inner Temple, Barrister-at-law, and F. G. C. Morris, Solicitor. London, Effingham Wilson, 54 Threadneedle Street, E.C. 1911: Toronto, The Carswell Co. Ltd., 19 Duncan Street.

The object of this little book is to set before the reader the essential features of the law and procedure governing the formation of limited companies when inviting public subscriptions. Primarily it is intended to be of service to promoters, directors, investors and all other persons connected with companies of the kind referred to. While it is impossible in such a short work to deal exhaustively with all the legal decisions which affect public companies, an attempt has been made to refer to the leading cases on the various branches of the subject in such a way that none of the essential and important questions which frequently arise have been overlooked.

Topham's Real Property. An Introductory Explanation of the Law relating to Land. Second Edition. By Alfred F. Topham, barrister-at-law. With test questions for the use of Students, by F. P. Fausset, barrister-at-law: London, Butterworth & Co., Temple Bar, Bell Yard. Toronto, The Carswell Co. Ltd., 19 Duncan Street.

This work is intended as a first explanation of a very intricate subject and is necessarily intended primarily therefore for students. A careful perusal will put one in a position to understand and appreciate the true value of the more important works on this subject. A number of new cases have been added in this edition, and different passages have been amplified and revised.

Challis's Law of Real Property: Chiefly in relation to Conveyancing. Third Edition. By Charles Sweet, barrister-at-law: London, Butterworth & Co., Temple Bar. Toronto, The Carswell Co. Ltd., 19 Duncan Street. Price, $5.50.

In this edition Mr. Challis's text and notes have been reprinted *verbatim* from the second edition. Additions and comments by the present editor are enclosed in square brackets. The book is not overloaded with modern authorities, references being made to the opinions of text writers or to judicial decisions only in cases where questions of principle seem to be involved.

A Treatise upon the Law of Light. Including an Exposition of the Law relating to the Nature, Acquisition, Preservation and Extinguishment of the Easement or Right to Light, and the Remedies afforded for the Protection of Window Lights. By R. G. Nicholson Combe: London, Butterworth & Co., Temple Bar. Toronto, The Carswell Co. Ltd., 19 Duncan Street.

There is a wide distinction between the law of light and the general law of other well-known easements. The law of light has always stood upon a peculiar footing, and the provisions of the Prescription Act, 1832, relating to claims to the amenity of light, have added to its isolation as a distinct branch of the law. It is of course a matter of notoriety that the easement of light is now to be regarded as a right to the freedom from a particular form of nuisance. Prescription being an important branch of the law of light three chapters have been devoted to the subject. The fifth chapter deals with the general principles of the abstruse doctrine, and contains a full and clear exposition of the law of prescription, and a useful historical treatment of the development of the doctrine of prescriptive presumptions. The sixth chapter treats of prescriptive claims to light prior to the passing of the Prescription Act, 1832. The seventh chapter deals with prescriptive claims to light under the above Act. The eighth chapter is devoted to the extinguishment and variation of light easements. The ninth chapter approaches the subject from a purely practical standpoint, and deals with the remedies available to a person whose right has either been wrongfully interfered with, or whose enjoyment of light is threatened by a contemplated obstruction.

Canadian Criminal Procedure as the same relates to Summary Convictions and Summary Trials, with an Appendix and Forms. Compiled by the Hon. T. Mayne Daly, P.C., K.C., of the Manitoba Bar, Police Magistrate of Winnipeg. The Carswell Co. Ltd., 19 Duncan Street, Toronto, 1911.

One is agreeably surprised on picking up this book to find how easily it is handled owing to the publishers having wisely selected a light weight paper. This with the attractive binding makes a highly creditable production from the printer's standpoint.

The learned compiler is well fitted from his having been a member of the special Parliamentary Committee to which the Criminal Code was referred on its passing through the House of Commons; his wide experience at the Bar and as Police Magistrate of Winnipeg, to prepare this work, which will be found essential to all Justices of the Peace and Police Magistrates as well as a valuable addition to the working library of every Canadian lawyer. This is the first work relating to the powers, rights and duties of Magistrates since the Code was revised in 1906. The following brief summary will indicate slightly the scope of the work. The first chapter briefly deals with the passing of the Criminal Code, the Criminal Law in Canada, Magistrates and Justices of the Peace, their qualifications and their appointment. In chapter two the procedure under the Criminal Code is more generally dealt with, those sections of the Code having a general application to Criminal Law being more specially noticed and considered. Chapter three, treats of the jurisdiction of Justices in general; the fourth of their responsibility and of the remedies against them. The fifth and sixth chapters deal respectively with the information and complaint and the summons and warrant of arrest. The seventh chapter contains a very full description of the preliminary inquiry. Chapter eight deals with Summary Convictions. Chapter nine with Summary Trials of Indictable Offences, the notes and references to each chapter being very complete. The proceedings in connection with *habeas corpus* and *certiorari* are carefully examined in chapter ten. The final chapter in this useful work deals with Evidence, Limitation of Actions and Arrest without Warrant. Then follow the forms prescribed by part twenty-five of the Code. Appendix "A" gives the forms requisite in connection with *Certiorari* and *Habeas Corpus* proceedings, the taking of evidence under commission and stated cases. In appendix "B" will be found Statement of Offences under part two of the Code.

Company Law. A practical hand book for lawyers and business men. With an appendix containing The Companies (Consolidation) Act 1908, and other Acts and rules. By Sir Francis Beaufort Palmer. 9th edition. London, Stevens & Co., 119 and 120 Chancery Lane. Toronto, Arthur Poole & Co., 321-322 Confederation Life Bldg., 1911.

The object of this well known work is to set forth the leading provisions of the Companies (Consolidation) Act, 1908, and at the same time shew by reference to the principal decisions how the acts have been interpreted by the Courts and how the provisions thereof have been supplemented by the application of the general rules of law and equity. It has been the evident aim of the author to make the work not only practically useful to lawyers and to law students, but generally to business men. Eight large editions of this work have been sold since its publication in 1898, and that it has been found most useful is evidenced by the fact of its common use not only in Great Britain and Ireland, but throughout Canada, Australia, New Zealand, India and the United States. This work is a necessity for those interested in the incorporation of companies.

THE LIGHT SIDE OF THE LAW.

CHANCERY AND THE TRUSTEE.

The Chancery Division is the reformed rake of our judicial system. Time was when its very touch spelled ruin; when its practitioners waxed fat upon infants' and lunatics' and administered estates generally; when equity lawyers of fathomless learning made broad their phylacteries at the cost of decaying houses, ruined lands, melting funds; when babies were born into Chancery suits, lived under their shadow, and escaped only by dying out of them; when beggared litigants haunted the Court through endless processes, and watched hopelessly the attenuations and subtleties which clogged the cumbrous machine.

"Suffer any wrong that can be done you rather than come here." Such was the warning uttered only fifty years ago by one who had studied the dreadful institution.

To the lay mind the distinction between equity and common law has always been, and is probably fated to remain, a mystery. It is a matter of principles and history confusedly interwoven, upon which even lawyers cannot usually manage to make themselves clear.

The Court of Chancery itself, unfortunately, has acquired a reputation which strikes horror into the unsophisticated mind; but the word "equity," has a pleasant sound to the natural ear. The commonest conception of equity is that of a region wherein those elements of emotion and personal feeling which lie at the back even of the driest litigation can find vent, and wherein is dispensed a beautiful justice regardless of precedent or technicality. Not even experience of the unreformed Court of Chancery managed to dispel that sanguine impression. A more cultured popular idea is that equity arose as a sort of enlightened jurisdiction mitigating the harshness and narrowness of the earlier common law dispensation, and that about the time of the opening of the present Law Courts a sort of pentecostal descent took place, whereby the bright light of equity was henceforth to illuminate equally all courts of justice.

Leave lawyers to decide amongst themselves the precise virtue to be attributed to the Judicature Acts. The fact remains that, since that time, the Chancery Division has never looked back. It has jettisoned its refinements, its technicalities, and its excrescences—to poison the sharks and the conger eels.

"My lord," said counsel, when it was hinted that his confused and hopeless cause was wasting the time of the Court, "this is a case where we must search for the equity."

"Don't you think," insinuated the rare and lamented Bowen, "that is rather like a blind man at midnight in a dark room searching for a black hat that isn't there?"

We live in a day when the well-advised litigant, aiming at certainty and dispatch, will actually limit and distort the form of his action, so as to bring it into conformity with the class of work allocated to the Chancery Division. Take action on the common law side, and you may find yourself bucketed about from Master to Master and from Judge to Judge till your feelings are like those of the legendary parrot in the bag of nails. And there may be a period of anything from a year to two years before trial, during which your sense of injury and desire for justice die out. You are apt to become a member of the peace-at-any-price party, until your solicitor conveys the significant intelligence that, on the principle of "double or quits," it will be advisable *now* to go on and take your chance rather than to drop the action.

It is not, however, all actions that can be brought on the Chancery side. That division continues mainly its old line

of business, and prominent in that is its control and supervision of all that comes under the heading of "Trust."

Why men consent to be trustees remains a mystery. Exalted altruism is a rare virtue, found only in exceptional cases; and it is from the mass of sober, unremarkable men that trustees are mostly selected. An inability to say "No" doubtless has slain its thousands. The sense of importance conferred by the office of trustee, and the opportunity of a voice in the affairs of others, afford motives perhaps sufficient for the average man, and, if not lofty ones, at all events are not incompatible with an honest determination to carry out trusts.

Now, "Equity ever loves a trust"; but the trustee it has chastised with scorpions. Why, in its inscrutable wisdom, the law has chosen to apply a stricter code to the unpaid trustee than it does to the well-paid director—who also handles other people's money—would be an interesting, but perhaps unprofitable, inquiry. The law requires of a trustee a precise observance of his trust; it applies to him a high standard of diligence; it makes it almost impossible for him to contract with his beneficiary, and quite impossible for him to make a profit out of him. It is difficult to see why these rules should not apply with equal fullness to directors. The law requires an unpaid trustee to be acquainted with the details of his trust, and assumes in him knowledge and intelligence to perform it. There seems no reason why a director who is paid should not, in like manner, be obliged to understand his work and to take pains about it.

Chancery applies so high a standard to trustees that its fist sometimes comes down with tremendous force upon morally innocent men. Indeed, in these latter days this has been recognized, for in 1896 there crept into an Act of Parliament a remarkable provision designed to relieve trustees from the consequences of breach of trust where they have acted honestly and reasonably "and ought fairly to be excused."

The clause in question, or rather the sentiment that lies at the back of it, is one to make a lawyer's hair stand on end. Not that that matters. But it may prove—and, indeed, before now has proved—a false friend to the class it is intended to benefit.

Consider it for a moment. What is a "reasonable" breach of trust? A trust more honoured in the breach than the observance? Are trustees to improve on the testator's intentions? If the breach is reasonable, it would seem that the

trust itself may be unreasonable. It may almost be the duty of the trustee to break the bonds imposed upon him. Is the Court going to assist him to amplify shortsighted and unskilful settlements, to curb the eccentricities and extravagances of testators? Are the difficulties of investing trust moneys to be considered and the importunities of widows to prevail?

Decisions have shewn that the clause is dangerous to rely upon, and it certainly removes trustees from the firm, if rocky, ground upon which hitherto they have stood. It may be used as a lever in the hands of beneficiaries, operating most effectually in the case of soft hearted trustees. Hitherto the will or settlement has been the trustee's bulwark. No need to discuss the merits of a projected breach of trust. To all arguments, eloquence, and entreaty there has always been the simple and conclusive "*non possumus.*"

But now: Picture the widow scantily provided for, and with children of tender years. It cannot be necessary, it is urged, to realise those remunerative leasehold properties and industrial investments left by the deceased husband. The will was made before he acquired them, and a re-investment in authorised securities with diminished returns will mean breaking up the home and loss of social position. Surely, it is argued, that is the very state of things contemplated by the section. Benevolent trustees asquiesce. Time rolls on. The places of the infants are quietly filled by trustees of marriage settlements and by insurance companies holding charges upon reversionary interests. A long gathering storm bursts in connection with the winding up of the trust. The section is judicially expounded as not applicable, in the circumstances, to the retention of wasting securities, and at the last, to borrow a phrase of the late R. L. Stevenson, some bland old bird is knocked over in his back garden and his family reduced to beggary.

The ways of equity are still winding, thorny paths, and they are whitened with the bones of honest, thick-headed trustees.

CONSULTING A SOLICITOR.

Whatever may be said about a solicitor's occupation, no one truthfully can call it monotonous. You can be gloomy and call him a necessary evil, or spiteful and refer to his devastating activities, or sarcastic and speak of him as a costly luxury; but you cannot pity him by saying that his profession is a dull one.

"Mr. Jones to see you, sir," announces the clerk. Mr. Jones follows. You inquire after his health, comment on the weather, and bid him be seated.

Mr. Jones may want to sell his house, to divorce his wife, to file his petition, or to know his position as endorser of a matured bill of exchange. You cannot tell until he opens his mouth. His business may be an everyday transaction which can safely be handed on to a clerk; or it may involve some nice, sharp quillet of law which means a hurried visit to counsel as soon as Mr. Jones, soothed and assured for the time being, has gone on his way. Lawyers, like doctors, soon learn to play for time; it is the more youthful of both professions who are ready to commit themselves to an exact diagnosis in the early stages of a case.

The solicitor sits in his office professing knowledge of the law—not of any department of it, but of the whole unwieldy mass. He is licensed to expound it, and to take fees for doing so. He rarely specialises. He is prepared to take on all comers. *Ut veniant omnes.* So Mr. Jones sits on the other side of the table and fires his shot.

He may not use weapons of precision, but consider the exposed area! Equity and common law and statute law; laws of the sea and laws of the land, property law, mercantile law, patent law, marital law. Obsolete laws to trip you, reversed decisions to mislead you, amendments to confuse you; and, even while you are speaking, thirty-one Judges sitting in the Supreme Court or perambulating the circuits, elaborating, refining, and distinguishing their own judgments.

English law is not a system, it is a growth—an amorphous, blind growth. There is an excuse for a layman describing it as a fortuitous concourse of atoms, a coil of serpents in a basket, a welter of eels in a tub,

A solicitor never knows what he may not be asked to advise upon. Poor humanity often feels a pain without knowing where to look for a remedy. There is a type of man who will consult his clergyman about his business troubles, his doctor about his investments, and his solicitor if he suspects the accuracy of the gas meter. This writer's professional experience has ranged from a request that he would personally eject a defiant and drunken gardener, to an invitation to pronounce dogmatically upon the credentials of the Book of Ecclesiastes.

Clients, in fact, are, in their natures and their requirements, as diversified as are the laws with which fate compels

them to grapple. There is, for instance, the gentleman from the rural districts. He usually calls accompanied by his wife. Without venturing too far upon what is in these days perilous ground, testimony may be borne to the fact that there are men, compendiously to be described as the salt of the earth, who still place implicit reliance upon the intuition of their spouses even in matters wholly alien to the excellent ladies' training and modes of thought. These clients sometimes bring little propitiatory gifts of tomatoes, strawberries, or fresh eggs. After the first compliments, the lady will sit silent—struck dumb, probably, by her dirty surroundings and the crying need for hot water and strong soap; forming unutterable opinions as to the abilities of the office-cleaner. She may, however, be relied upon to ask at the right moment what it is all going to cost, and her comments when they leave are, one fancies, not devoid of a certain acumen.

There is the gentleman buying a property, who also, before instructing you, wishes to know the cost. Be not misled by that artless inquiry. He probably knows exactly what the scale charges are, and has obtained, or endeavoured to obtain, from two or three other solicitors a tender for the business. This man's view as to the work and responsibility involved often render a bland and professional manner difficult to maintain. There is the gentleman who regards litigation as a speculation to be shared in by the solicitor, and is obtuse to the necessity of paying fees to counsel until it is seen how the matter turns out. There is the merchant, whose account is disputed, who cannot understand—and small blame to him—why the settlement of a question of £100 should take eighteen months and involve four times that amount in costs. There is the luckless lady whose encounter with the trustee of an insolvent builder involves the very point for the settlement of which by the House of Lords the text-book writers have been waiting for years. There is litigation based upon obstinacy, and litigation with hate and malice at the bottom of it. There are suits which are a prolonged bluff exposed only on the day of trial, and there are suits which beggar a man and suck the life and energy and strength out of him.

English law, it is said, is the best and the most expensive in the world. Well, that is not the only matter wherein those two adjectives are correlative. Cheap and nasty are also often bracketed together in human affairs. Be that as it may, one finds as a rule, that it is the heaviest and the lightest craft that best weather the storms of litigation. The big

companies, the county councils, the societies, and the federations—they are the leviathans who roll and wallow and toss through the courts with splendid array of counsel. And the light craft—the parties who deal in libels, conspiracies, blackmail, divorce, breach of promise, who supply copy for the evening papers—they mainly get what they expect and what they deserve. And if, sometimes, those who are out for wool come home shorn—well, it is sad, but this old world presents many problems over which the tear of pity can better and more appropriately be shed.

But, for the mass of sober citizens, litigation is a hazardous sport; the game is too strenuous and the play too high. *Ce n'est que le premier pas qui coute.* Litigation, like matrimony, is a conspicuous exception to that proverb. In both, the first step is almost the only one the cost of which is trivial. What is a writ of summons? A junior clerk can issue it in five minutes at the cost of half a sovereign. It is the trumpet blast that preludes the stormy symphony. For the plaintiff it is just the opening move—pawn to king's iv. For the defendant it may be a "casement opening on the foam of perilous seas." Let us hope that three lines and a marginal reference in a text-book is a form of immortality consoling to the parties who pay for the great battles of the law.

Lawyers see the worst side of human nature, and thereby become soured and cynical—so people say. Well; yes, and no. Men deceive their pastors—from shame; and they lie to their doctors—from fright; but they are usually quite candid with their legal advisers. Perhaps for no very flattering reason. "Thou thoughtest that I was altogether such an one as thyself," many a solicitor must have thought, if he has not said, as he has received the unashamed instructions and learned the desires of his client.

Yet, taking a wider view, there is not much room for a better opinion of mankind:

"We are not dealing with magnificent creatures such as one sees in ideal paintings and splendid sculptures. We are dealing with hot-eared, ill-kept people who are liable to indigestion, baldness, corpulence and fluctuating tempers; who are pitiful and weak and vain and touchy almost beyond measure, and very naughty, and intemperate, who have, alas! to be bound over to be in any degree faithful and just to one another."

So has Mr. H. G. Wells described his fellow-creatures. One cannot help admiring him, not only for his insight and

force of style, but for the candour which impels him to express such an opinion of the raw material upon which he and his co-workers hope to impose the difficult standards of the new socialism.

In truth, the present system of competition and strife is a sore enough test for the average man. It is a sobering experience to watch and consider the great centripetal movement which, once in every twenty-four hours, flings millions of hot, dusty, eager little men into this great London, each one intent on turning his ninepence into a shilling.

"I only want my legal rights."

How often a lawyer hears those words, uttered with almost pathetic insistence. And who is any solicitor, that he should judge between that man and the community with which he must wrestle? It is he versus the world. So he bares his soul, and his desires are unrestrained and his cupidity unabashed.

"I only want my rights"; whereby he means the utmost that skill and cunning and subterfuge can attain for him.

But behind the man, mean and repellent as he may be, there are—as likely as not— others dependent upon his wrestling. He may have just enough ability and foothold to keep his head above stream. He may have bad health so that the life assurance societies shake their heads at him, and he wakes, sometimes, in the small hours in a sort of frenzy, thinking that he may drop out of this bustling world, leaving his womenkind to the mercies of the community. Small wonder that he wants his rights. His debtor urges:

"I am ill and my business shrinks, and I cannot pay what I owe": to which he replies, "If you do not pay, my children and I may hunger."

It may mean submersion for one or the other of them. So the creditor presses, and the solicitors are the hammer and anvil to beat out the ugly business.

Solicitors are not philanthropists, neither are they moralists. Yet sometimes they may associate themselves with these higher types of men in thinking *tout comprendre, c'est tout pardonner.*

GEO. A. MACDONALD.

IN VACATION.

No statute ever enacted in England is of greater importance than the Habeas Corpus Act, yet the passage of this enactment, at least at the particular time when it finally came before the House of Lords, was due entirely to a jest.

Lord Grey and Lord Norris were named as tellers when the vote upon the Bill was to be taken. Lord Grey was heartily in favour of the Bill, which, however, seemed doomed to defeat. An immensely fat Lord declared for the passage of the Act, and Lord Grey jestingly counted him for ten. Lord Norris, without looking up, sat down ten votes. Lord Norris instantly went on with his reckoning, or misreckoning, and in due course it was reported to the House that those for the Bill were the majority, though, as an actual matter of fact, the majority of the Lords had declared against it.

A man was being examined with reference to his qualifications as a juror in an important case, involving a considerable sum of money.

"You understand," said the lawyer, "what is meant by a preponderance of evidence?"

"Yes, sir," replied the other promptly.

"Let me have your idea of it."

"I understand it, I tell you."

"Well, what is it?"

"Why, anybody can understand that."

"I would like to have your definition of it."

"I know what it is," replied the man, hotly. "When I tell you I know what it is, I know it. That's all there is about that."

"Well, what was the question I asked you?"

"You ought to know what that was. If you've forgot your own questions, don't try to get me to remember them for you." "I don't want to hear any more of that kind of talk," interposed the Court. "Answer the questions addressed to you by the counsel."

"Judge, I did. He asked me if I knew what it was, and I said I did."

"Are you sure you understand what is meant by the term 'preponderance of evidence?'" asked the Court sharply.

"Of course I am, Judge."

"Define it, then."

"It's evidence previously pondered."

A long-winded prosy barrister, says a contemporary, was arguing a technical case recently before one of the Judges of the High Court. He was drifting along in a desultory way when the Judge yawned suggestively. "I sincerely trust that I am not unduly trespassing on the time of the Court?" said counsel with a suspicion of sarcasm in his voice. "There is a difference," replied the Judge, "between trespassing on time and encroaching on eternity."

The case concerned a will, and an Irishman was a witness. "Was the deceased," asked the lawyer, "in the habit of talking to himself when alone?"

"I don't know," was the reply.

"Come, come, you don't know, and yet you pretend that you were intimately acquainted with him."

"The fact is," said Pat dryly, "I never happened to be with him when he was alone."

A coloured man was brought before a police magistrate charged with stealing chickens. He pleaded guilty and received sentence, when the Judge asked how it was he managed to lift those chickens right under the window of the owner's house when there was a dog in the yard.

"Hit wouldn't be no use, Judge," said the man, "to try to 'splain dis thing to yo' all. Ef you was to try it you like as not would get yer hide full of shot an' get no chickens, nuther. Ef yo' want to engage in any rescality, Judge, yo' better stick to de bench, whar yo' am familiar."

Sir Edward Carson, K.C., an Irishman, is one of the wits of the English Bar, and a skilful and deadly cross-examiner.

He recently began his cross-examination of an offensive witness thus:—

Carson: "I believe you are a heavy drinker?"

Witness: "That's my business!"

Carson (without a moment's hesitation): "Have you any other?"

It is needless to say that the promptness of the question, and the laughter which followed, put the witness completely at counsel's mercy.

Young Doctor—"Well, old chap, at last I have a case; and he has lots of money, too."

Young Lawyer—"All right, Doc., when you get him to the point where he wants a will drawn up, why, just 'phone over. He may be the means of getting us both started."

A pompous member of the Bar of the Quaker City was seeking to convey the impression that his income from practice was exceedingly large. "Gentlemen, I have to earn a good deal. My personal expenses are over fifteen thousand dollars a year. It costs me that to live."

"That's too much," interjected a fellow-lawyer. "I wouldn't pay it—it isn't worth it."

A certain jurist was an enthusiastic golfer. Once he had occasion to interrogate, in a criminal suit, a boy witness.

"Now, my lad," he said, "are you acquainted with the nature and significance of an oath?"

The boy raising his brows in surprise, answered:—

"Of course I am, sir. Don't I caddy for you at the Country Club?"

The jury, after having been out for some time, appeared before the Court, and asked for further instructions.

Court:—"On what subject do you need enlightenment?"

Jurymen:—"We desire to know who the plaintiff is."

The centenary of the Paris Bar, recently celebrated at the Palais de Justice, has recalled numerous anecdotes which are going the rounds of the law Courts.

Among others it is told how a well known lawyer was pleading a rather tiresome case and noticing that the Judges were paying no attention to him, said: "As the president is falling asleep I suspend my speech." But the Judge had just woke up and cried, "And I suspend you from practising for six months." Nothing daunted, the lawyer retorted, "Well, I suspend myself for ever and ever," and gathering up his brief and cap he left the Court and never appeared again.

Another Paris advocate, however, was more vigorous. Seeing that the president and the assessors were all asleep, he stopped, and, dealing a tremendous blow on the desk in front of him which woke everybody up with a start, he cried: "Yesterday at this same hour I was saying—" and the whole bench rubbed their eyes and asked each other if they really had slept through twenty--four hours.

The same counsel was pleading at Versailles on a cold day and remarked that the Judges were all turning more and more around towards a stove that gave out a welcome heat. "The tribunal behind which I have the honour of speaking," brought them all "right about face" at once.

On another occasion the Judge asked him to cut his speech short, as the Court had made up its mind. Assuming the air of a childlike native, he retorted: "Me right, you good Judges, him innocent," and sat down.

The American attorney who advertised himself as a "grower and shipper of pineapples and stringbeans," 31 C. L. T., p. 93, was enterprising enough. But did you ever happen to notice, in the British Columbia Provincial Directory, the designation of the late Hon. C. F. Cornwall, who appeared in those pages as "County Court Judge and *Rancher!*" This seems to be a similar case of mis-joinder.

In one of the provincial Appeal Courts in France a boy, about fourteen, was summoned to give evidence, and his appearance was such as to move the whole Court to laughter. He was small even for his age. He wore a long redingote,

peculiar to the Basque country, and immense boots. His trousers, collar, and hat were unquestionably those of a man. The Court was convulsed, and the president asked the boy how he dared to treat the Court in such a manner. The boy seemed as surprised as the president, and taking out the citation from his pocket, read the formula inviting him, "*Comparaitre dans les affaires de son pere.*" (To appear in his father's suit.)

A story is current in legal circles that not long ago a caustic barrister applied for leave to appeal, saying: "My lords, I beg to ask your leave to appeal against a decision by Mr. Justice ——" (one of our present Judges), when he was interrupted by one of the Judges with the question: "Any other reason?"

Mr. Justice Ridley once startled a witness who was appearing in a case tried before him. Some question had arisen as to whether the witness was speaking the truth or not, and the witness was naturally very indignant. "I have been wedded to the truth from infancy!" he declared." "Quite so," agreed the Judge; "but the real question now is: "How long have you been divorced?"

Counsel (to the jury):—"The principal fault of the prisoner has been his unfortunate characteristic of putting faith in thieves and scoundrels of the basest description. I have no more to say. The unhappy man in the dock, gentlemen of the jury, puts implicit faith in you!"

Once a witness was asked in cross-examination by an eminent counsel whether it was true that he had been convicted of perjury. The witness owned the soft impeachment, and the cross-examining counsel very properly sat down. Then it became the duty of an equally eminent K.C. to re-examine. "Yes," said he, "it is true you have been convicted of per-

jury. But tell me: Have you not on many other occasions been accused of perjury and been acquitted?"

Lord Eldon is ever held up as the greatest of delayers. There is an old anecdote of those times. A certain barrister being asked by the regular reporter of Lord Eldon's decisions to take a note of the proceedings of the day, entered in it the following lines as a full record of all that was material which had occurred during the day:—

"Mr. Leach made a speech
Angry, neat 'and' wrong;
Mr. Hart, on the other part
Was 'right' but dull and long;
Mr. Parker made 'that' darker
Which was dark enough without;
Mr. Cook 'quoted' his book—
And the Chancellor said—'I doubt.'"

In a New Brunswick village a town character who preferred emphasis to the verities was a witness in a petty trial involving an auger. He positively identified it as the property of the parties to the suit.

"But," asked the attorney for the other side, "do you swear that you know this auger?"

"Yes, sir."

"How long have you known it?" he continued.

"I have known that auger," said the witness impressively, "ever since it was a gimlet."

A worthy and provident man went to his legal adviser to make his will. He gave many instructions, and it seemed that everything was arranged. The lawyer began to read over his notes, and put a point to his client.

"Oh—you have made provision for your wife in the event of her surviving you. Does that remain unaltered if she should marry again."

"No, no," said the client, eagerly. "What am I leaving her?" One thousand dollars a year. If she marries again make it two thousand."

"The lawyer thought there must be a misunderstanding and pointed out that most men put it the other way about.

"I know," said the client, "but the man who takes her will deserve it."

"That's so, Colonel; I was drunk, all right," the man at the rail admitted gently, even with a note of pathos in his thick voice. "I don't deny it, Judge, but I'll tell you just how it was. I've got a sick wife at home, terrible sick; nobody to do for her but me. I haven't had my clothes off nor laid down for four nights. When I went out last night I—well, I just had to have a bracer, Colonel, and I got a little too much under my belt; that's so. The woman's all alone up at the house, Colonel. I'll have to get back somehow."

"That's queer," interrupted the magistrate, with quiet conviction. "We received a letter from your wife and she asks me to keep you locked up as long as possible. Says you're in the way at home—a nuisance. She is glad to be rid of you."

Silently, without apparent surprise, the prisoner shuffled toward the door on his way to jail. Then he looked back.

"Say, Judge," he called out, "there are two awful liars in this room, and I'm one of 'em. I ain't got no wife!"

On a recent trial a witness denied that she had told a certain man when he met her that she was a widow. "I told him I was a grass widow," she asserted. The lawyers argued as to the exact meaning of that term. Thereupon the Judge handed down this luminous definition:

"There are two kinds of widows—grass and sod. The sod species — sometimes known as the common or garden variety of widow—is relieved of the burdens of a spouse. The grass widow has a husband on her hands, but cannot put said hands upon him.

CANADIAN NEWS.

P. W. Shannon has become city solicitor of Saskatoon.

J. E. O'Connor, Claude Isbister and Thomas Morton have formed a law partnership at Winnipeg under the firm name of O'Connor, Isbister & Morton. Mr. Morice will be retained as advising solicitor.

J. N. Armstrong, of North Sydney, has been appointed a King's Counsel.

John D. O'Neil, barrister, London, died on the 9th March.

H. A. Turcotte, K.C., Quebec, died on the 10th March.

Colin McKenzie, barrister, Sydney, has taken over the law practice formerly carried on at Sydney by Mr. Hugh Ross.

W. E. Lincoln Hunter, and G. P. Deacon, Toronto, have formed a law partnership under the firm name of Hunter & Deacon.

H. J. Palmer, K.C., Charlottetown, has been selected as leader of the Government of that province. He was appointed Q.C., in 1898, and on several occasions has been acting Attorney-General and probably will be appointed Provincial Attorney-General.

Walter Read, K.C., Toronto, died on the 7th May. The late Mr. Read was for many years a member of the law firm of Read & Read, Toronto, but during the past two years he has been engaged in connection with the revision of the Revised Statutes of Ontario.

Hon. L. Belanger, formerly Judge of the Quebec Superior Court, died on the 5th May.

E. A. Dunbar, barrister, Guelph, has removed to Calgary, Alberta.

Harold C. N. McKim, formerly of the law firm of Davis, Marshall, McNeil & Pugh, Vancouver, has joined the law firm

of Williams & Walsh, which will hereafter be known as Williams, Shaw & McKim.

Hon. Mr. Justice F. X. Lemieux has been appointed Chief Justice of the Superior Court of Quebec in the place of Sir Francois Langelier, who has been appointed Lieutenant-Governor of Quebec.

C. E. Dorion, K.C., has been appointed to fill the vacancy made in the Superior Court of Quebec by the appointment of Judge Lemieux, as Chief Justice. Mr. Dorion was admitted to the Bar in 1884.

J. Carlyle Moore and H. G. Scott have formed a law partnership at Red Deer under the firm name of Moore & Scott.

Chas. G. Locke, barrister, Lucknow, Ont., has removed to Calgary, Alta.

H. Davison Pickett having withdrawn from the law firm of Willoughby, Pickett, Craig & McWilliams, Moose Jaw, will practise alone in that city.

At the annual meeting of the Bar of Quebec held on the 1st of May the following officers were elected: Batonnier, L.A. Taschereau, Syndic, Eusebe Belleau; treasurer, Aime Dion; secretary, Charles Smith, and councillors, F. X. Drouin, A. T. Bender, G. C. Stuart, C. E. Dorion, P. V. Chaloult, F. Murphy, Ernest Roy and A. Galipeault.

The elections of the Montreal Bar Association were held on the 1st May, when the following officers were elected: Batonnier, A. J. Brown, K.C.; Syndic, A. C. Harwood, K.C.; treasurer, S. Morin; secretary, J. E. Boulin, and councillors, A. E. Delorimiers, Arnold Wainwright, R. Dalfousse, Pierre Boulac, S. Letourneau, C. A. Guerin, Frank J. Curran, and C. DeMartingy.

At the recent election for Benchers of the Law Society of Upper Canada the following were elected:—F. W. Harcourt, A. G. Mackay, C. A. Moss, T. C. Robinette, E. D. Armour, James Bicknell, George Lynch-Staunton, W. R. White, F. H. Chrysler, T. H. Lennox, Wallace Nesbitt, C. A. Masten, J. M. Glenn, E. F. B. Johnston, A. E. H. Creswicke, N. W. Rowell,

I. F. Hellmuth, William Proudfoot, J. E. Farewell, W. A. Logie, W. S. Brewster, F. E. Hodgins, John Cowan, W. F. Kerr, W. D. McPherson, H. H. Dewart, W. B. Northrup, W. H. McFadden, A. C. McMaster, Matthew Wilson.

Sir George Gibbons, and Mr. A. H. Clarke having been elected for four terms are now ex-officio Benchers.

W. L. Bernard, one of the oldest members of the Alberta Bar, died on the 19th May. He was the senior member of the firm of Bernard & Bernard, Calgary.

The Minister of Justice has given notice of a resolution setting forth that it is expedient to provide that an annuity equal to their present salaries, be granted to each of the Judges of the Yukon Territorial Court now holding office.

The annual meeting of the St. John Law Society was held on the 9th of May. The following were elected members of the council:—Dr. Alward, Recorder Baxter, Judge Armstrong, Attorney General Hazen, Messrs. Daniel Mullin, K.C., E. T. C. Knowles, A. A. Wilson, K.C., W. A. Ewing, K.C., and J. Roy Campbell. Subsequently the council elected Judge Armstrong president, and Mr. Charles F. Sanford, secretary-treasurer. It was decided to ask the Legislature for power to increase the practitioners' fees from $10 to $15 for barristers practising five years or over.

M. E. O'Brien, barrister, Wetaskiwin, died on the 11th May.

The fourth annual meeting of the Regina Law Society was held on the 9th May. The following are the officers: Honourary President, Hon. A. Turgeon, Attorney-General; President, J. F. Frame, LL.B.; Vice-President, G. H. Barr; Secretary-Treasurer, P. H. Gordon; Executive Committee, J. A. Cross, D. J. Thom, Avery Casey, J. F. L. Embury, and Alex. Ross; Auditor, E. Jackson.

The following are the results of the final year of the law examinati ns held at Easter by the Law Society of Upper Canada. Passed with honours—I. Singer, G. A. Urquhart, G. T. Goetz, F. T. Hughes, W. G. Bartlett, N. W. Lyle, T. G. M. Hugh.

The following have passed—A. Cohen, F. P. Saunders, F. W. Wilson, G. Cooper, E. T. Coatsworth, G. N. Shaver,

R. P. Coatsworth, G. M. Macdonell, R. T. Driver, G. A. Grover, P. Kerwin, W. W. Davidson, E. S. Williams, A. McNaughton, R. Honeyford, H. J. V. McKenna, J. Parker, E. K. Williams, W. B. Waters, A. Singer, C. W. Livingstone, T. Moss, A. V. Wood, W. J. M. Glass, C. A. Thompson, H. H. Davis, G. T. Davidson, J. A. McNevin, W. L. Carr, A. H. Gibson, W. A. Morrison, H. S. Murton, I. A. Humphries, F. B. Edmunds, D. A. Cameron, D. A. G. Swanson, J. E. Madden, A. M. Boyd, F. R. F. Stewart, R. J. Hubbard, E. C. Ironsides, H. E. Snider, G. G. Paulin, J. Aitchison, J. P. Ebbs, T. A. Silverthorne, T. R. Sloan, J. M. Duff, N. E. Towers, W. H. Bourdon, H. A. Newman, C. S. Buck, W. J. McLarty, J. Gilchrist, G. W. Ballard, A. G. Parish, H. H. Gilchrist, R. A. Junor, W. H. Kirkpatrick, F. W. Deutchman, R. P. McBride, J. M. Adam. Three failed to pass.

Alexander Shaw, K.C., of the law firm of Shaw & Scott, Walkerton, died on the 21st of April.

A. H. Hord has joined the law firm of Thomson & Kennedy, Wolseley, which will hereafter be known as Thomson, Kennedy & Hord.

R. K. Smith has been admitted into partnership with his father, C. R. Smith, Amherst, N.S., the new firm being known as C. R. & R. K. Smith.

A. A. Fisher of the law firm of Hutcheson & Fisher, Brockville, has been appointed Junior Judge of the County Court of Renfrew in succession to the late Judge Thomas Deacon.

H. S. Hunter, of the law firm of Hall & Hunter, Smith's Falls, was married on the 19th April, to Miss G. N. Bradley.

R. G. Affleck, of the law firm of Richards, Affleck & Co., Winnipeg, has gone to England as Captain of the 79th Cameron Highlanders, which has been sent over to take part in the Coronation services.

Colin MacLeod has opened a law office at Coleman, B.C.

The annual meeting of the Oxford Law Society was held on the 16th April, the following officers being elected: President, His Honour Judge Fitzie: First Vice-president, T.

Wells, K.C.; Ingersoll; Second Vice-president, S. G. McKay, Woodstock; Secretary-Treasurer, J. H. Nellis, Woodstock; Library Committee, W. T. McMullen, R. N. Ball, H. A. Little and P. McDonald.

J. M. Owen, barrister, Annapolis Royal, N.S., has been gazetted a King's Counsel.

M. A. Macdonald, of the law firm of Harvey, McCarter & Macdonald, has joined the law firm of Ross & Lane, Fernie, B.C.

T. P. Morton, Rainy River, having entered into partnership with H. Acheson, Saskatoon, the new law firm will be known as Acheson & Morton.

The following are Benchers of the British Columbia Law Society for the ensuing year: J. H. Senkler, K.C., E. P. Davis, K.C., E. B. Bodwell, K.C., G. E. Corbould, K.C., C. H. Tupper, K.C., C. E. Pooley, K.C., L. C. McPhillips, K.C., H. D. Helmcken, K.C., and R. S. Lennie.

F. R. Blewett, of the law firm of Blewett & Bray, Listowel, has removed to Stratford taking over the business of E. Sydney Smith, K.C.

W. B. A. Ritchie, K.C., Halifax, has removed to Vancouver, where he will be associated with the law firm of Bowser, Reid & Wallbridge.

J. A. Calder and W. A. F. Turgeon, Minister of Education and Attorney-General respectively, in the Saskatchewan Government, have withdrawn from the law firm of Turgeon, Fish and Calder, Regina. P. M. Anderson, of the law firm of Mackenzie, Brown, Thom & McMorran has become associated with Mr. Fish, the firm now being known as Fish & Anderson.

At the recent meeting of the St. John Law Society a resolution was passed respecting the late A. C. Fairweather, K.C., a respected member of that Society since its formation, and a barrister of forty-four years standing of the Supreme Court of New Brunswick.

T. A. Colclough, chief Law Clerk of the Attorney-General of Saskatchewan has been appointed Deputy Attorney-General of that Province.

J. W. P. Ritchie, Halifax, and Miss G. Wilson, of Belfast, Ireland, were married on the 19th April.

A. E. Tulk has been called to the Bar of British Columbia.

His Honour D. Finlayson has been appointed Surrogate Judge in Admiralty of the Exchequer Court for that portion of the Nova Scotia Admiralty District, composed of the counties of Cape Breton, Victoria, Richmond and Inverness.

J. Stewart Mavor, who was recently admitted to the New Brunswick Bar has entered into partnership with F. H. Peters, Fredericton, the firm name being Peters & Mavor.

H. A. Archer, Stoughton, and E. J. Campbell, of Carnduff, have formed a law partnership at Arcola, under the firm name of Archer & Campbell.

A. M. Matheson, Arcola, has sold out his practice to E. J. Brooksmith, it being Mr. Matheson's intention to resume practice in one of the western cities.

At the annual meeting of the Bar of Bedford, Que., held on the 1st May at Sweetsburg, the following officers were elected: Batonnier, A. J. E. Leonard; Syndic, Z. E. Cornell, K.C.; Treasurer, R. Clontier; Secretary, G. H. Boivin; Members of the Council, C. A. Nutting, K.C., E. W. Westover, and J. S. Poulin. It being the twenty-fifth anniversary of the organization of the Bedford Bar, it is the intention of the Bar of that district to celebrate the event in a suitable manner.

The officers of the Hull Bar Association for the year 1911-12 are: T. P. Foran, K.C., President; Wm. Gamble, Treasurer; A. J. Brooke, Batonnier; A. Desjardins, Syndic; and H. Aylen, K.C., H. Chauvin and J. W. St. Marie, Councillors.

Judge Jeremiah Travis, of Calgary, died on the 27th April.

On the 27th April the following officers of the Junior Bar of Montreal were elected: President, A. Vallee; Vice-president, Arthur Phelan; Secretary, R. Roy; Treasurer, J. T. Hackett.

R. V. Rogers, K.C., of the law firm of Kirkpatrick, Rogers & Mickle, Kingston, died on the 1st of May. The late Dr. Rogers frequently contributed articles to the *Canadian Law Times* and other legal magazines.

Pedro Alma, barrister, Toronto, died on 13th June.

Miss Melrose Sissons has applied to be enrolled as a law student in Manitoba.

A. E. Dunlop, barrister, Kentville, N.S., has removed to Lethbridge, where he has entered into partnership with S. J. Shepherd, the firm name being Shepherd & Dunlop.

W. B. A. Ritchie, K.C., Halifax, who is leaving to practice in Vancouver, was given a farewell banquet on the 19th May by the Halifax Bar.

W. J. Moore, barrister, Madoc, died at Toronto on the 17th May.

J. C. Judd, K.C., has been appointed Police Magistrate of London.

Mr. Jephson, has commenced practice at Athabasca Landing, Alta.

A. R. Boswell, K.C., Toronto, has been appointed Registrar of Insurance and Inspector of Friendly Societies for Ontario.

G. F. Harman, barrister, Toronto, has been appointed to the position occupied by the late Walter Read, K.C., in connection with the Ontario Revised Statutes Commission.

W. F. Nickle, K.C., M.P.P., Kingston, was married on the 6th June, to Miss Katie Gordon.

J. T. Small, K.C., of the law firm of Henderson & Small, Toronto, was married on the 6th June to Mrs. M. J. Truesdale.

H. E. Snider, is now associated with the law firm of Kerr & Thompson, Hamilton.

A. Huntly Duff of the Montreal law firm of Heneker, Duff & Johnson, has severed his connection with that firm intending to practise alone.

Daniel Coughlin, barrister, St. Thomas, died on the 5th June.

His Honour Judge Hatton, Judge of the County Court of Grey, died on the 10th of June. The late Judge formerly practised law at Meaford in partnership, under the firm name of Skinner & Hatton, subsequently moving to Owen Sound where he became associated with Hon. A. G. McKay, K.C., the firm then being McKay & Hatton. Afterwards he practised alone until he was appointed Senior Judge of the County of Grey in 1902.

W. M. Charters, barrister, Ponoka, has removed to Leduc.

The law firm of Richardson & Sparling, Grenfell, has been changed to Sparling & Neff.

Jas. A. McNevin, barrister, Toronto, has joined the law firm of Gundy & Bracken, Chatham, which will hereafter be known as Gundy, Bracken & McNevin.

The following have been called to the Bar of Manitoba and sworn in as solicitors: F. K. Hamilton, R. J. McClelland, H. W. Graham, O. C. S. Lovell, F. F. Montague, E. A. Fletcher, T. K. Moore, C. E. Williams, A. J. Sutherland, C. A. Crawley, H. R. Drummond-Hay, E. A. Deacon, C. G. Keith and A. S. Douglass.

His Honour Neil McCrimmon, Senior Judge of Ontario County, died on the 12th June. Judge McCrimmon was born at Vankleek Hill, Glengarry County. He commenced the study of law in 1882, being called to the Bar in 1887. He first practised at St. Thomas in partnership with Angus McCrimmon, the present Crown Attorney of Elgin County. Subsequently he removed to Toronto, becoming a member of the law firm of Macdonald, Macintosh & McCrimmon. He was appointed Senior Judge of Ontario County in 1900.

Charles Shaw, barrister, Winnipeg, died on the 15th June.

J. H. Scott, K.C., has been appointed Town Solicitor of Walkerton.

Victoria, B.C., proposes to abolish the position of City Barrister.

A. J. Brown, K.C., of the law firm of Brown, Montgomery, & McMichael, has been elected Batonnier of the Bar of the province of Quebec. At the same meeting Victor Martineau was re-elected Secretary-Treasurer.

The annual meeting of the Prince Edward Island Law Society was held at Charlottetown on the 26th June. The following officers were elected for the ensuing year: President Æneas A. McDonald, Vice-President, C. R. Smallwood, Secretary, W. E. Bentley, Executive Committee, D. E. McLeod, K.C., J. A. Mathieson, K.C., K. J. Martin and Gilbert Gaudet.

Among the Canadians receiving Coronation honours are Hon. Mr. Justice Routhier, of Quebec, who has been knighted, and Sir Charles Fitzpatrick, Chief Justice of Canada, who has been given the Grand Cross of the order of St. Michael and St. George.

Hon. T. Mayne Daly died at Winnipeg, on the 24th June. He was Minister of the Interior in the Cabinets of Sir John Abbott and Sir John Thompson. He was educated at Upper Canada College, and for many years practised law at Brandon and Rossland, until his removal to Winnipeg, where he practised his profession for a time until his appointment as police magistrate of that city.

One hundred and fifty lawyers from the city of Buffalo visited Toronto on the 24th June. After a banquet at the Prince George Hotel and a drive around the city they returned to Buffalo. Short addresses were delivered at the banquet by Sir Allen Aylesworth, Minister of Justice, Hon. Mr. Justice Riddell, and Mr. H. T. Kelly, K.C.

The
Canadian Law Times.

VOL. XXXI. AUGUST, 1911. No. 8.

EXCEPTIONS TO THE RULE IN RYLANDS v. FLETCHER.

This well known case established the rule which, after the lapse of over forty years, has come to be generally regarded as a principle firmly embedded in our legal system and a rule founded, to use the language of Lord Cranworth, "in good sense." The rule, as finally determined in the House of Lords, on appeal, may be briefly formulated thus:—

"The occupier of land, who brings or keeps upon it anything likely to do damage if it escapes, is bound at his peril to prevent its escape, and is liable for all the natural and probable consequences of its escape; even if he has been guilty of no negligence."

A double duty, therefore, rests upon the owner or occupier of land; a negative, as well as a positive one. While it is his duty to refrain from active injury, at the same time it is equally his duty to guard and protect his neighbour, lest he suffer harm by reason of possible danger in consequence of what he brings or keeps upon his land. In such a case he becomes an insurer of his neighbour, as has been aptly said, against all harm independently of the existence of either wilful intent or negligence. Formerly it has been held by many able Judges, that the duty in such a case was merely a duty to take all reasonable and prudent precautions in order to safeguard his neighbour from all injurious effects its presence might cause; but no more. The decision, however, of the House of Lords, settled the question, once and for all, that it was an absolute duty to be observed at his peril.

This, like many good rules, is subject to exceptions. These exceptions we will proceed briefly to recapitulate.

FIRST EXCEPTION.

If the act done which causes the injury, is that of a stranger, the owner or occupier of the premises is not liable. In the case of *Box* v. *Jubb et al.* (1879), L. R. 4 Ex. D. p. 76, it was held, defendants were not liable under the following statement of facts. The defendants possessed a reservoir with sluices connected with a watercourse. The plaintiff's premises were flooded by reason of the overflowing of the defendants' reservoir. The overflowing was caused by the emptying of a large quantity of water from a reservoir of a third party into the watercourse, at a point some distance above defendants' premises. The defendants' reservoir was constructed and maintained in a proper manner, so as to prevent the overflowing of the reservoir under all ordinary circumstances. No wrongful act or negligence was attributable to defendants.

In reversing the judgment of the County Court in favour of plaintiff, Kelly, C.B., said:—

"The matters complained of took place through no default or breach of duty of the defendants, but were caused by a stranger over whom and at a spot where they had no control. It seems to me to be immaterial whether this is called *vis major,* or the unlawful act of a stranger; it is sufficient to say that the defendants had no means of preventing the occurrence. I think the defendants could not possibly have been expected to anticipate that which happened here, and the law does not require them to construct their reservoir and the sluices and gates leading to it to meet any amount of pressure which the wrongful act of a third person may impose. The judgment must be entered for the defendants."

In commenting upon the case of *Nichols* v. *Marsland* (1875), L. R. 10 Ex., at p. 259, Bramwell, B., is reported, in referring to the water in the defendants' reservoir, in manner following:—

"Suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be."

Pollock, B., in his judgment in *Box* v. *Jubb*, remarks that the case of *Rylands* v. *Fletcher* is distinguishable. In

that case the water that caused the injury was collected by the occupier. Here the water was not accumulated by the defendants, but came from elsewhere and added to that which was properly and safely there. For this the defendants, both on principle and authority, cannot be held liable. The overflow, which in this case caused the injury, did not proceed from the act or default of the defendants, but from that of a stranger over which they had no control.

SECOND EXCEPTION.

Another exception arises in the case where water is brought or kept upon his premises by the defendant, not exclusively for his own purpose, but with the consent of the plaintiff, and likewise for his benefit. In such a case the defendant is only liable for negligence. It usually finds its application in the storeys of a building in the occupancy of different tenants, where water escapes from an upper storey. In like cases the water is brought upon the premises for the mutual benefit of the different occupants and with their express or implied consent.

In *Carstairs* v. *Taylor,* L. R. 6 Ex., p. 217, the plaintiff hired of the defendant the ground floor of a warehouse, the upper part of which was occupied by the defendant himself. The water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains. A hole was made in the box by a rat, through which the water entered the warehouse and wetted the plaintiff's goods. The defendant had used reasonable care in examining and looking to the security of the gutters and the box. In an action for the damage so caused, it was held that the defendant was not liable, either on the ground of an implied contract, or on the ground that he had brought the water to the place from which it had entered the warehouse. The Court held, the defendant could only be liable in case he was guilty of negligence, since the roof was the common protection of both, and the collection of water running from it was also for their joint benefit.

In a New Brunswick case, that of *Tennant* v. *Hall,* 27 N. B. Reports, page 499, the question underwent careful consideration. The plaintiff in this case leased from the defendant the ground floor of a building. The upper part of the building was occupied by the defendant. The roof was flat or

nearly so. In the centre was a box sunk into the roof into which the water drained. The water thus accumulated was conveyed by a pipe to the cellar and thence into a sewer in the street. During a severe rain storm, the pipe proving insufficient to carry off the water, it backed up and ran down through the building, and injured plaintiff's stock of goods. Verdict was found for defendant. On motion for a new trial. Mr. Justice King, after referring to the rule laid down by the House of Lords in *Rylands* v. *Fletcher,* said:—

"This case is within the class of cases already alluded to, where a landlord in possession of part of the leased premises does an act for the benefit of plaintiff, as one of his tenants, as well as for the benefit of himself and others of the tenants. In such case he is excused by the mere absence of wrongful act, or negligence, in the construction and maintenance of the work through which the damage is caused.

Now here, there can be no doubt that the water was led away from the roof for the benefit of all the tenants (the plaintiff amongst others) as well as of the defendant. The roof was a common protection for all, and all were interested in the safe carrying away of the water naturally falling upon it. Then, as to the absence of negligence in the construction and maintenance of the cistern and pipes, there was evidence on which the jury might indeed have found either one way or the other, but they have found in favour of the defendant, and no question is made as to the terms in which the learned Judge left to the jury such question of negligence; nor indeed do I perceive that any valid objection could be taken to the way in which it was so left. I, therefore, think that the verdict should not be disturbed."

THIRD EXCEPTION.

The rule does not apply when the damage is the result of *vis major* or, as is generally expressed, the Act of God. Difficulty has frequently arisen as to the interpretation of the phrase, Act of God. Mr. Justice Brett's definition of what is termed the "Act of God" is frequently referred to as a model of precision and accuracy. He defines it as "such a direct and violent and sudden and irresistible act of nature as could not by any amount of ability have been foreseen, or if foreseen, could not by any amount of human care and skill have been resisted."

Chief Justice Sir John Allen of New Brunswick, in *Tennant* v. *Hall,* defines *vis major* as a "violent and irresistible act of nature which could not have been guarded against by any ordinary exertions of human skill and prudence."

In the case of *Nichols* v. *Marsland,* L. R. 10 Ex. 255, affirmed on appeal in 2 Ex. D., p. 1, where the defendant formed ornamental pools by damming up with artificial banks a stream which flowed through his land and which was allowed to escape from the pools by weirs into its original course, and an extraordinary rainfall caused the stream to swell so that the embankments were carried away by the pressure of the water, and injured the plaintiff's adjoining property, it was held that the action was not maintainable; the jury having found that the escape of the water was caused by the Act of God, and that there was no negligence on the part of the defendant in the construction or maintenance of the embankments.

Lord Justice Mellish, in delivering judgment, said: — "The remaining question is, did the defendants make out that the escape of the water was owing to the Act of God? Now the jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented; and this seems to us in substance a finding that the escape of the water was owing to the Act of God. However great the flood had been, if it had not been greater than floods that had happened before and might be expected to occur again, the defendant might not have made out that she was free from fault: but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature, which she could not anticipate. In the late case of *Nugent* v. *Smith,* 1 C. P. D. 423, we held that a carrier might be protected from liability for a loss occasioned by the Act of God, if the loss by no reasonable precaution could be prevented, although it was not absolutely possible to prevent it.

It was indeed ingeniously argued for the appellant that at any rate the escape of the water was not owing solely to the Act of God, because the weight of the water originally in the reservoirs must have contributed to break down the dams, as well as the extraordinary water brought in by the flood.

We think, however, that the extraordinary quantity of water brought in by the flood is in point of law the sole proximate cause of the escape of the water. It is the last drop which makes the cup overflow."

FOURTH EXCEPTION.

In *Nield et al.* v. *The London and Northwestern Railway Co.* (1874), L. R. 10 Ex., p. 4, defendants were held not liable, under the following statement of facts. They were the owners of a canal near a river. The canal, however, was not supplied with water from the river. Fearing an overflow of a flood of water from the river, during an extraordinary rainfall, they erected a barricade of planks in the canal above their premises. The overflow from the river broke into the canal at a point above the barricade, and at a point opposite the plaintiff's premises, which were likewise situate on the banks of the canal above the premises of the defendants. The water being penned back by the obstruction flooded plaintiff's premises. The Court, on appeal, found the defendants were not liable, since they had nothing to do with bringing the water to the place where it did the injury complained of, and they were justified upon the principle of self-preservation to guard themselves the way they did against sudden and extraordinary casualties. Bramwell, B., said:—

"Therefore, on the ground that the defendants in no sense brought the water, or caused it to come to the place where the damage happened, but that it came by natural causes, that is, by a heavy fall of rain, and the overflowing of the river, the defendants had the right to protect themselves against it, and the plaintiffs cannot complain although what the defendants did in so protecting themselves suggested the damage to them."

In *Hodgson* v. *Mayor of York* (1873), 28 L. T., p. 836, it was held the owner of land was not liable for damage done his neighbour in consequence of the overflow of a stream, running through it, caused by the growth of weeds or the deposit of silt in its bed.

Where the owner of a coal mine, in his operations, caused a subsidence of the surface, and a consequent flow of rainfall into an adjacent lower coal field, the injury arising from gravitation and percolation is not a valid ground for any claim of damages. See *Wilson* v. *Waddell* (1876), L. R., 2 A. C., p. 95.

In *Giles* v. *Walker* (1890), L. R., 24 Q. B. D., p. 656, it was held, no duty was cast upon an owner or occupier of land to cut thistles naturally growing thereon to prevent their seeding. If he do not cut them and the seeds were carried by the wind upon his neighbour's land and damage thereby caused, he was not liable.

SUMMARY.

1. The rule in *Rylands* v. *Fletcher,* which renders one liable for accidental harm, regardless of negligence or wrongful intent, is said to be one of the most important cases of absolute liability recognized in our law.

2. Under this rule the occupier is not only liable for the acts of the members of his family, his servants, his guests, or licensees permitted to use his land; but in addition he is vicariously liable for the acts of an independent contractor, even though he acts in excess or disregard of his authority. See *Black* v. *Christ Church Finance Co.* (1894), A. C., p. 48,

3. This rule of absolute liability extends to damage done by the trespass of the cattle of the owner or occupier of the land upon the adjoining property of his neighbour. See judgment of Lord Coleridge, C.J., in *Ellis* v. *Loftus Iron Co.* (1874), 10 C. P., p. 10.—"It has been held, again and again, that there is a duty on a man to keep his cattle in, and if they get on another's land it is a trespass; and that is irrespective of any question of negligence, whether great or small."

4. It likewise applies to the case of one, who brings upon a street or public highway anything dangerous or interferes with any dangerous thing already there, which causes damage to adjoining property; and this apart from any proof of negligence. See *Midwood* v *The Mayor of Manchester,* L. R. (1905), 2 K. B., p. 597.

5. In the case of *Hargroves Aronson & Co.* v. *Hartopp et al.,* L. R. (1905), 1 K. B., p. 472, defendants were held liable upon the following facts: Plaintiffs were tenants of the ground floor in a building of which the defendants were landlords. The rain water from the roof was carried off by a gutter, the possession and control thereof being in defendants. The gutter having become stopped up, notice was given by plaintiffs to defendants, that it required cleaning. Defendants neglected to act upon this notice. After the lapse of

four or five days from receipt of the notice, plaintiffs suffered damage by reason of the rain water having found its way into their premises in consequence of the stoppage. Verdict was found for plaintiffs on the ground of negligence.

6. In *Miller* v. *Hancock,* L. R. (1893), 2 Q. B., p. 177, the defendant, a landlord, was held liable to a person, not a tenant, for allowing the common stairway of rented premises to get into a defective condition, whereby the plaintiff suffered damage.

7. Formerly, for the accidental escape of fire from the premises of an occupier, or in the case of setting fires in clearing land or destroying brushwood, in case of damage to neighbouring property, the liability was the same as for the escape of any other dangerous thing. The common law rule, however, is now virtually overborne by statutory enactments, the rules and regulations of cities, towns and municipalities, with respect to keeping, setting and guarding fires. See *Filliter* v. *Rhippard* (1847), 11 Q. B., p. 347. At page 354, Lord Denham, C.J., is thus reported: "The ancient law, or rather custom of England, appears to have been, that a person in whose house a fire originated, which afterwards spread to his neighbour's property and destroyed it, must make good the loss. And it is well established that, when the fire was occasioned by a servant's negligence, the owner, the master of the house where it began, is answerable for the consequences to the sufferer."

8. A landlord is liable for damage done for a nuisance existing at the time of the letting of the premises, without taking any covenant from the tenant to prevent or discontinue it.

9. If a private nuisance has been in existence for twenty years continuously, a prescriptive right to continue it is acquired as an easement appurtenant to the land. It is otherwise in regard to a public nuisance which lapse of time cannot legalize.

10. Where a nuisance is caused in the exercise of statutory powers no action will lie if done without negligence. An action, however, will lie for doing that which the legislature has authorized, if it cause damage and is done negligently. In *Canadian Pacific Railway* v. *Parke,* L. R. (1899), A. C., p. 535, the Court held: Whether an act amounting to a nuisance is justified or not by statute, is a question of construction in each case. When the terms of the statute

confer an absolute power, which is exercised without negligence, the nuisance is justified. When the terms are permissive merely, the proper inference is that the power must be exercised subject to the common law rights of other persons.

St. John, N. B. SILAS ALWARD.

CORPORATE PERSONALITY.

From the earliest period of our judicial history, lawyers and Judges have reiterated the doctrine that a corporation is an intangible legal entity, without body and without soul. In almost Athanasian terms, the orthodox doctrine of a corporation as a legal person, separate and distinct from the personality of the members who compose it, has been defined and propagated. In these latter days, a sect of heretics has arisen who, rejecting the teachings of the fathers, deny or disparage this great doctrine. But these heretics do not seek to belittle the questions at issue between themselves and the orthodox party. Far from it. They rather strive to exaggerate the importance of those questions, in order to pose as great reformers, engaged in a gigantic task of emancipating the legal world from the thraldom of a mediæval superstition.

In the heated controversy thus engendered, it is difficult, indeed, for any American lawyer writing upon the subject of corporations to avoid declaring himself. If he endeavours to preserve silence, his failure to speak is attributed to cowardice, or to a lack of clearly defined convictions upon a fundamental question. He is not permitted to treat the whole controversy with indifference. The direct interrogatory is pressed upon him, "Under which king?" He is called upon to vouch for his legal character by formulating his creed, in much the same way that each English sovereign has heretofore been required by his coronation oath to testify his adherence to the principles of the Reformation.

But sharp as the controversy may appear to have been among us, it is mere guerilla warfare, a few desultory skirmishes, in comparison with the pitched battles and protracted

campaigns in which Continental jurists have waged war over this doctrine. With us, the literature of the subject, on the orthodox side, consists in a *dictum* reported by Coke,[1] referred to by Blackstone,[2] and reiterated monotonously by every law student, together with a number of modern decisions which apply, or misapply, the doctrine. The opposing party can point to a few statements in text-books, often contradicted or seemingly contradicted by other passages in the same treatises, and to some modern decisions and *dicta* in which Judges have somewhat ostentatiously repudiated the doctrine as a mere conceit of the schoolmen. On the Continent, on the other hand, whole volumes have been devoted to this one doctrine, and rival theories have been developed whose adherents have formed themselves into parties almost as well-defined as the Epicureans, the Stoics, or any other of the historic philosophic sects. In Germany, in France, in Italy, learned treatises occupied wholly with this doctrine of corporate personality are constantly appearing.[3]

Our complete oblivion to all this wealth of controversial learning strikingly exhibits the insularity of our English law. Are not Coke and Blackstone, sources of the common law, better than all the scholars of Europe? It may be that this patriotic confidence is justified, and that all that foreign learning furnishes no lesson from which we can derive profit; but if so, it would be reassuring to find some defender of our faith who, having imperiled his legal soul by mastering the occult learning of Continental jurists, should be able to state reasons why no Anglo-American lawyer need vex his English soul with that mass of foreign lore. Here, however,, it is impossible to do more than make brief mention of some

[1] Sutton's Hospital Case, 10 Co. 32.

[2] 1 Bl. Comm. 476, 477.

[3] A complete bibliography of the subject would be of appalling size. The following are a few of the more recent foreign treatises dealing with this subject: Binder, Das Problem des juristischen Personlichkeit (Leipzig, 1907); Hölder, Natürliche und jurisdische Personen (Leipzig, 1905); Meurer, Die juristische Personen (Stuttgart, 1901); Mayer, Die juristische Person und ihre Verwertbarkeit in öffentlichen Recht (Tübingen, 1908); Schwabe, Die juristische Person und das Mitgliedshaftsrecht (Basel, 1900); Rechts-subject und Nutzbefugnis (Basel, 1901); Die Körpershaft mit und ohne Persönlichkeit (Basel, 1904); De Vareilles-Sommières, Les Personnes Morales (Paris, 1902); Michoud, La Théorie de la Personnalité Morale (two volumes. Paris, 1906 and 1909); Pic, Sociétés Commerciales, vol. 1, title II., ch. 1 (Paris, 1908); Ferrara, Le Persone Giuridiche (Naples, 1907-1910); Barillari, Sul Concetto della Persona Giuridica (Rome, 1910).

of the leading theories,[4] as an introduction to an examination of the subject on principle.

I.

The Roman law gave but little consideration to what we call corporations, and the whole law of the subject consisted in a number of ambiguous and unfortunate phrases which have been the sources of much of the confusion, both in English law and in the law of Continental Europe. The canon law, while it devoted more consideration to the subject, did not develop any well defined theory. In spite of the scholastic flavour of the *dicta* on the subject transmitted to us by Coke, the Canonists cannot fairly be charged with originating the confusion surrounding the subject.

Savigny in Germany, in the first half of the nineteenth century, began the scientific or metaphysical consideration of the subject. He observed the fact that property belongs in law to a corporation and not to any individual, and the question which he put to himself was, "Who or what is the real owner of this property?" With this question theoretical writers in Germany and elsewhere have ever since busied themselves. Savigny's answer was that the corporate property belonged to a fictitious being and not to any real person or entity. He took as his starting-point the proposition that ownership involves the possession of a will by the owner; and he concluded that inasmuch as a corporation does not really possess a will, it must, as a property-owner, be a fictitious person. At the same time, as an acute French writer has demonstrated, Savigny and his followers, paradoxical as it may seem, impute a certain reality to this fictitious person.[5] For instance, they speak of it as created by the state.

Savigny's doctrine, or some doctrine closely akin thereto, was generally accepted in France from his time until quite recently; and all students of the common law will recognize in this theory the most prominent features of the orthodox doctrine of Anglo-American law—even including its self-contradictions.

[4] See historical review in Binder, Das Problem der juristischen Persönlichkeit, 1-34; Michoud, La Théorie de la Personnalité Morale, 16-99; Ferrara, Le Persone Giuridiche, 22 *et seq.*

[5] De Vareilles-Sommières, Les Personnes Morales, ch. II.

In Germany, however, objections began to be raised to this theory almost as soon as it was definitely formulated. Accordingly, a school arose, led by Brinz, which taught that corporate property is not owned by a fictitious being, created by the State, but by no person at all. It is not the property of a person, but of a purpose — "Zweckvermögen." This theory was primarily intended to explain the ownership of property by charitable foundations. Although Brinz has found few followers, yet his theory undoubtedly contains an element of truth; for the property of every corporation, not merely charitable corporations, but also business companies, is in a sense dedicated to an object. But we of the common law recognize in such a dedication, not the ownership of the property by an object, but rather the elements of a somewhat peculiar trust. The purpose to which such property is dedicated amounts to a mere restriction on the otherwise more extensive right of disposition enjoyed by those who manage the property.

This "Zweckvermögen" theory, like that of Savigny, regarded the personality of corporations as fictitious; but in the meantime a rival school arose, which teaches that corporations are real persons. This personality is neither fictitious, nor artificial, nor created by the state, but both real and natural, recognized, but not created by the law. When a company is formed by the union of natural persons, a new real person, a real corporate "organism," is brought into being. Of this school, which in some form or other has long been dominant in Germany, Gierke is the leading exponent. In the hands of some writers, this doctrine is carried to grotesque lengths. The corporate organism is an animal: it possesses organs like a human being. It is endowed with a will and with senses. It even possesses sex: some corporate organisms, like the church, are feminine, while others, such as the state, are masculine. One opponent of this doctrine ironically propounds the question whether a marriage with a legal person is valid.[6] Of course, in the hands of most writers, this reality theory of corporate personality is much more refined. For instance, Gierke himself, has a much less anthropomorphic conception of the corporate organism. Some writers make the real corporate organism a mere colourless, lifeless "subject of rights." Some,

[6] De Vareilles-Sommières, Les Personnes Morales, pp. 77-78.

with Zitelmann, hold that the corporate organism possesses a will, and is for that reason a real person. Others assert that a corporation has no will, but that a will is not essential to personality.

Some writers, notably Ihering in Germany, M. de Vareilles-Sommières in France, and Schwabe in Switzerland, have rejected all the foregoing views. They teach that the "subject of rights" in cases of corporate ownership of property is simply the natural persons who compose the entity. They concur with the advocates of the fiction theory in maintaining that the personality of a corporation, or even its existence as an entity, is a pure fiction or metaphor. but they maintain that the fictitious personality is not "created" by the State. because it does not exist. To them. a corporation is merely an abbreviated way of writing the names of the several members.

When we turn homeward from these foreign theories, we find that no English or American lawyer has philosophized about the question, although the orthodox doctrine in this country is similar to Savigny's, and is, like his, full of self-contradictions. The orthodox American lawyer would be apt to say, "A corporation is a fictitious, artificial person, composed of natural persons, created by the state, existing only in contemplation of law, invisible, soulless, immortal." Now, such a definition is a *congeries* of self contradictory terms. For example, a corporation cannot possibly be both an artificial person and an imaginary or fictitious person. That which is artificial is real, and not imaginary: an artificial lake is not an imaginary lake. nor is an artificial waterfall a fictitious waterfall. So a corporation cannot be at the same time "created by the state" and fictitious. If a corporation is "created," it is real, and therefore cannot be a purely fictitious body having no existence except in the legal imagination. Moreover, a corporation cannot possibly be imaginary or fictitious and also composed of natural persons. Neither in mathematics nor in philosophy nor in law can the sum of several actual, rational quantities produce an imaginary quantity. As, therefore, the orthodox doctrine contains so many mutually contradictory propositions. it behooves us to study the question on principle.

II.

What, then, is the corporate entity? Is it real or imaginary? Is it natural or artificial? Is it "created by the state," or does it spring into existence spontaneously? Is it a person or is it not?

The difficulties of the inquiry are manifold; for the most abstruse questions of philosophy become pertinent. At the very outset, we are confronted by Pilate's question, "What is truth?" or by the cognate question, "What is reality?" For certainly we cannot well determine whether the corporate entity is real, unless we first decide what reality is. For instance, an idealist, who believes that chairs and tables have no existence save in his own mind, is very apt to impute to the ideal corporate entity the same degree of reality—neither greater nor less—which he attributes to such material objects. So, the question whether, or in what sense, a corporation is a person, naturally involves an inquiry into the nature of personality, than which no more profound or baffling question can be conceived. In such metaphysical mazes it is easy to lose one's self.

Now, in respect to the nature of a corporation, there are two basic propositions, (1) that a corporation is an entity distinct from the sum of the members that compose it, and (2) that this entity is a person. These propositions are often confused; but they are properly quite distinct from one another. For example, one who denies that a corporation is really a person, or who accepts that proposition merely as a figurative statement or fiction of law, is not at all bound by logical consistency to deny the reality of the corporation as an entity distinct from the sum of the members.[1]

III.

Let us, therefore, address ourselves first of all to the question whether, or in what sense, a corporation is an entity distinct from the sum of the members.

[1] See De Vareilles-Sommières, Les Personnes Morales, sec. 232, where the author says: "Remarquons tout d'abord que, s'il était vrai que l'association fût quelque chose d'autre que ses membres, s'il était vrai que le tout fût quelque chose de plus que les associés, il ne s'en suivrait nullement que cette chose, ce tout, fût une personne. Où est le lien entre ses deux idées: les associés forment un tout; ce tout est une personne? Il y a un abîme entre elles. . . . Pour le combler, il faudrait y jeter cette majeure avec ses preuves: un tout composé de différents individus d'un certain ordre est toujours lui-même un individu du même ordre."

Now, consider for a moment any composite whole. Is a house merely the sum of the bricks that compose it? This question cannot well be answered in the affirmative; for you may change many of the bricks without changing the identity of the house. Or take such a common word as "bundle." Every child recognizes that the "bundle" is something distinct from the faggots, or what not, which compose it. When you have the separate faggots, you do not have the bundle; and you may change the faggots, or many of them, without destroying the identity of the bundle.

To come still closer to the subject, take such a simple idea as "school" or "church." Was there ever a schoolboy who had any difficulty in understanding that his school is something distinct from the boys that constitute it? He does not need to be told that the school may preserve its identity after a new generation of boys has grown up, so that not a single pupil remains the same, and though every teacher may have changed and though the school building may have been moved to a different location. He finds nothing strange or mystical in the conception of the school as an entity. Similarly, he needs no theological instruction, still less any metaphysical disquisition about the nature of an imaginary entity, to inform him that the church is the same church to-day as in the days of our Lord. Was there ever a pupil in a Sunday school who asked for explanation of the doctrine of "One Catholic and Apostolic Church" on the ground that every time there is a change in membership there must be a new church? On the contrary, much instruction would be required to make a healthy boy believe that the school or the church is a short-hand expression for the several members of the school or of the church, so that every time a new boy joins the school or a new member joins the church, there is a new school or a new church.

Any group of men, at any rate, any group whose membership is changing, is necessarily an entity separate and distinct from the constituent members.[8] The naturalness and indeed inevitableness of the conception of a corporation as an entity was pointed out by Mr. Morawetz:

[8] This may be demonstrated mathematically. Suppose a corporation composed of two members, a and b. Let c = the corporate entity. Now, if the corporate entity is merely the equivalent of the sum of the members, then $c = a + b$. Now, suppose b to assign his shares to d, then $c = a + d$. But this cannot be unless b is the same as d, which is absurd. Therefore, c, the corporate entity, is not equivalent to the sum of the members.

"The conception of a number of individuals as a corporate or collective entity occurs in the earliest stages of human development, and is essential to many of the most ordinary processes of thought. Thus, the existence of tribes, village communities, families, clans, and nations implies a conception of these several bodies of individuals as entities having corporate rights and attributes. An ordinary copartnership or firm is constantly treated as a united or corporate body in the actual transaction of business, though it is not recognized in that light in the procedure of the Courts of law. So, in numberless other instances, associations which are not legally incorporated are considered as personified entities, acting as a unit and in one name; for example, political parties, societies, committees, Courts."[9]

All that the law can do is to recognize, or refuse to recognize, the existence of this entity. The law can no more create such an entity than it can create a house out of a collection of loose bricks. If the bricks are put together so as to form a house, the law can refuse to recognize the existence of that house—can act as if it did not exist; but the law has nothing whatever to do with putting the bricks together in such a way that, if the law is not to shut its eyes to facts, it must recognize that a house exists and not merely a number of bricks.

Hence, it follows that in recognizing the existence of a corporation as an entity, the law is merely recognizing an objective fact, while in refusing to recognize fully the existence of a partnership or voluntary association as an entity the law is shutting its eyes to facts. Therefore, what needs explanation in the common law is not the doctrine that a corporation is an entity, but the doctrine that a partnership or other voluntary association is not an entity. It is all but impossible for those unlearned in the law to think of a partnership otherwise than as an entity. It is hard to convince a sensible business man that when a senior partner gives his son, on attaining majority, a small interest in the firm, an entirely new firm is thereby created. The ordinary layman has the conception of the firm as an entity; and confusion and litigation arise because the Anglo-American law will not recognize, or will not fully recognize, that simple conception.

[9] Morawetz, Private Corporations, 2nd ed., § 1.

Hence, the oft repeated statement of lawyers and Judges that a corporation exists only in contemplation or intendment of law[10] is untrue. A corporation exists as an objectively real entity, which any well-developed child or normal man must perceive: the law merely recognizes and gives legal effect to the existence of this entity. To confound legal recognition of existing facts with creation of facts is an error—none the less serious because the law sometimes, ostrich-like, closes its eyes to facts and assumes that they have no existence. For instance, the common law refused to recognize the paternity of an illegitimate child and declared him to be *filius nullius;* but it did not follow that the parentage of children born in wedlock existed only in contemplation of law. In that case, the law recognized facts, in the other it refused to do so. Similarly although the law stubbornly blinks at the facts when it will not acknowledge the existence of a partnership or voluntary association as an entity, it does not follow that a corporation as an entity exists only in intendment of law. Because Nelson at Copenhagen would not see the signal to retreat, it did not follow that everything that he did see—the enemy's vessels and his own—existed only in his own mind.

We need not waste words in discussing the nature of the existence of this corporate entity. Its existence is precisely as real as the existence of any other composite unit. As Kyd, a writer who deserves a greater reputation than he enjoys, clearly stated, "A corporation is as visible a body as an army; for though the commission or authority be not seen by every one, yet the body, united by that authority, is seen by all, but the blind."[11] If a corporation is fictitious, the only reality being the individuals who compose it, then by the same token a river is fictitious, the only reality being the individual atoms of oxygen and hydrogen. The only difference is that one of the essential elements of an army, or of a river, consists in juxtaposition in space of the members, or of the molecules of water, whereas the bond of union in the case of a corporation is less material. But this difference is not at all fundamental; and the existence of a corporation is quite as real as the existence of the church,

[10] *Dartmouth College* v. *Woodward*, 4 Wheat. (U.S.) 518, 636; Sutton's Hospital Case, 10 Co. 32.

[11] 1 Kyd, Corporations, 16.

of the Republican Party, or of any other aggregation of men for good or evil. Whether this existence be ideal or material, it is certainly real.

In these days, it has become rather fashionable to inveigh against the doctrine that a corporation is an entity, as a mere technicality and a relic of the Middle Ages; but nothing could be further from the truth. A corporation is an entity—not imaginary or fictitious, but real, not artificial but natural. Its existence is as real as that of an army or of the church. This is the element of truth in the reality theory of corporate personality which, originating in Germany, has commanded wide acceptance not only in that country, but also in France and Italy.

IV.

Having thus established that a corporation is a real and natural entity, recognized, but not created by the law, we next encounter the question whether this entity is a person. The answer to this question is, of course, vitally affected by our definition of "person." If we use the word in the signification which it conveys to the ordinary English-speaking layman, undoubtedly the corporate entity is not, in truth and reality, a person. For the corporate entity is not a human being; it is not even a rational creature capable of feeling and willing. But the word may be used in some very different sense. "When I use a word," said Lewis Carroll's Humpty Dumpty, "it means just what I choose it to mean—neither more nor less;" and when Alice objected, "The question is whether you can make words mean so many different things," Humpty Dumpty replied, "The question is which is to be master—that's all." Many a German scholar has resolved, like Humpty Dumpty, that words shall not master him, and having thus impressed upon the word "person" his own meaning he demonstrates with absolute finality that the corporate entity is really a "person"—in his sense of the word.

Certain it is, however, that if the word is thus used in a special, non-popular sense, the proposition that a corporation is a person becomes a mere source of confusion. If by "person" the law means, not a rational, living creature similar to a man, but a mere "subject of rights,"—and this is the teaching of the more moderate members of Gierke's

school[12]—then, in the name of clearness let us adopt some less ambiguous designation for this "subject of rights." But if we do not lose ourselves in metaphysical discussions of the nature of juristic personality, but take common sense as our guide, we shall apprehend clearly that when a jurist first said, "A corporation is a person," he was using a metaphor to express the truth that a corporation bears some analogy or resemblance to a person, and is to be treated in law in certain respects as if it were a person, or a rational being, capable of feeling and volition.

That the *dictum,* "A corporation is a person" really means what we have just stated and not that a corporation is a "subject of rights" can easily be demonstrated. For true it is that there are or may be subjects of rights, which are not beings capable of feeling and volition, but they are not persons in any proper sense of the word. For instance, laws for the prevention of cruelty to animals recognize the lower animals as possessing a somewhat vague right to exemption from needless suffering. The law might go further: it might, for instance, recognize a trust for the maintenance and support of the testator's dogs or horses, and might permit of the enforcement of this right of those animals by a judicial proceeding in their names by *prochein amy,* in precisely the same way that the right of an infant *cestui que trust* would be enforceable; but the horses and dogs would not on that account be persons. Anything that is capable of enjoyment or feeling can be a subject of rights — a *"Geniesser"* as Bekker would say. Indeed, we may go further; for even a purely imaginary being may have legal rights. For example, our law recognizes and enforces trusts for the benefit of unborn children. So, a heathen code might recognize a right of Jupiter or Apollo to enjoy the sweet savour of a hecatomb or a burnt offering, and might enforce this right by judicial proceedings instituted in the name or on behalf of the divinities in question; and yet those deities, although "subjects of rights," would not be real persons.

The truth is that the essence of juristic personality does not lie in the possession of rights, but in subjection to liabilities. Those beings are "persons" in law to whom the law

[12] See, Michoud, La Théorie de la Personnalité Morale, 7: "Pour la science de droit, la notion de personne est et doit rester une notion purement juridique. Le mot signifie simplement un sujet de droit, un être capable d'avoir des droits subjectifs lui appartenant en propre, — rien de plus, rien de moins."

both can and does address its commands. Now, obviously, legal commands can be addressed to none but rational beings capable of feeling and volition. To all else, the law's commands, if addressed at all, must remain unintelligible and mere *brutum fulmen*. It needs no Canute to teach us that the sovereign's commands when addressed to the waves of the sea, or for that matter to aught but rational beings, are futile. The essential prerogative of man does not lie in rights, but in duties. Every system of law, from the Decalogue down, is founded upon thou-shalt-not's, addressed to beings capable of understanding the command, of feeling the penalty, and of exercising a will to act accordingly. It cannot be otherwise. No fiction can supply these essential elements of juristic personality: no law can create them. The only way the law can protect or enforce legal rights is by imposing punishment upon those who violate them—an idle proceeding unless the violator is a moral being, capable of being deterred by the threat of punishment.

It will be objected that this conception of personality would exclude idiots and infants. So it would; but what of it? In our ignorance of the nature of the mind or soul, we do not know where the mind of an idiot or an infant is situated, or whether it exists at all; but certain it is that for all legal purposes the mind of an idiot or an infant of tender years is as if it did not exist. We speak of idiots as persons, because they have the form of persons; but we recognize that the substance is not there. If society consisted exclusively of idiots or babes, there could be no law. They are persons only in form and *in posse*.

It will also be objected that the conception of legal personality stated above is too broad in that it would admit the legal personality of slaves. Now, we must concede that the law might refuse to recognize the personality of some classes of rational beings who are really capable of feeling and volition, just as we have seen that the law sometimes refuses to recognize the existence of facts—for example, in the denial of the paternity of illegitimate children. The law might refuse to recognize certain classes of rational men as subject to legal duties; but few if any systems of law have been so silly. The law finds difficulty enough in securing obedience to its commands without unnecessarily hampering itself by refusing to address them to some beings who by nature are capable of understanding and obeying them. For example,

although the law of the Southern States declared with emphasis that slaves were not persons, and deprived them of many of the rights usually enjoyed by persons, nevertheless it left them subject to legal duties. For instance, if a slave committed murder, he could be hanged. When the law declared that a slave was not a person, it meant merely that he was to be treated for some purposes as if he were not a person.

As a corporate entity is not a rational being, is not capable of understanding the law's commands, and has no will[13] which can be affected by threats of legal punishment, it follows—if demonstration be needed of a self-evident fact—that a corporation is not a real person, if the word "person" be used in its ordinary sense. In addressing commands to a corporation, the law can speak only to the human beings who compose it, or who manage and control its destinies. In form, punishment for violation of those commands may be inflicted on the corporate entity, but in so doing the law is using the corporate entity as a mere means of reaching the human beings who act for the corporation. Whether this method of reaching those human beings is the best or most effective need not now be considered. The point here, is that in denouncing its penalties upon corporations, the law is using the corporate entity as a mere sight to direct its shots towards the human beings who are behind the entity. This is the truth epigrammatically expressed in American politics by the phrase, "Guilt is personal."

So too, even in respect to rights attributed to the corporate entity, the object of the law is to carry those rights to the human beings who, collectively, compose the corporation and constitute, according to a foreign expression, its *substratum*. For although, as we have seen, the law might recognize other beings than men as possessors of rights, yet in fact neither our law, nor any existing system of law, does do so, except to a very limited extent. The law, as already mentioned, does recognize, and punish the infraction of, certain very imperfect rights possessed by the lower animals,

[13] Note, however, that Zitelmann maintains that a corporation possesses an "einheitlichen Willen," or "Verbanetswillen." Binder, Das Problem der juristischen Persönlichkeit, 22-23 criticising Zitelmann's theory on the ground that this will is of a very different character from the will of a person in the ethical sense. See also passage from Macaulay to be quoted in the continuation of this article.

and it does recognize and enforce rights of unborn children. But in the broad and large sense, the Declaration of Independence states an undeniable fact, when it asserts that Governments are instituted among men—not among animals or angels, but men—and that it is men whose inalienable rights to life, liberty and the pursuit of happiness the laws attempt to secure. Corporations are created, or allowed to be formed, by the state merely for the purpose of benefiting human beings.[14] For the rights of ideal entities, as such, the State has no concern. In the last analysis, it is men and not legal entities whose rights and liabilities the Courts must decide. The corporate entity, or personification, which we call a corporation is regarded as having rights and liabilities for the sake of convenience; but it is men of flesh and blood, of like passions with ourselves, who must in one form or another and in varying degrees enjoy the rights and bear the burdens attributed by the law to the corporate entity.

Therefore, the proposition "A corporation is a person" is either a mere metaphor or is a fiction of law. This is the element of truth in the "fiction theory" of the corporate entity, which both in England and on the Continent may be regarded as the orthodox doctrine.

But although corporate personality is a fiction, the entity which is personified is no fiction. The union of the members is no fiction. The acting as if they were one person is no mere metaphor. In a word, although corporate personality is a fiction, yet it is a fiction founded upon fact. It is as natural to personify a body of men united in a form like that of the ordinary company as it is to personify a ship. To argue that because the personality of a corporation is a product of the imagination, therefore the corporation itself, as anything different from the separate members, is a fiction would be as reasonable as to argue that because a ship is not really a female, and is personified only by way of metaphor, therefore it has no real existence except as a number of boards and nails.

[14] Ihering makes this proposition the basis of his conclusion that the real subject of rights is not the corporation but the individual members. "Niemand wird darüber im Zweifel sein, dass die einzelnen Mitglieder es sind, denen die Rechte, mit denen die juristische Person ausgestaltet ist, zugute kommen, und das diese Wirkung nicht eine zufällige ist, sondern dass sie den Zweck des ganzen Verhältnisses bildet, dass also die einzelnen Mitglieder die wahren Destinatäre der juristischen Person sind." Ihering, Geist des römischen Rechts, III, 356, quoted by Binder, Das Problem der juristischen persönlichkeit, 25.

To appreciate the difference between an imaginary personality, such as that of a corporation, which is a natural and spontaneous expression in figurative language of actual facts, and a purely fictitious person, whose existence is no mere personification of a real, but impersonal entity, it is only necessary to refer to some purely fictitious personalities. For there are, or have been, fictitious personalities existing only in contemplation of law; but they are very different from corporations. The fictions in ejectment present the best example. John Doe, the common lessee, and Richard Roe, the casual ejector, exist only in contemplation of law. They are pure legal fictions. They represent no natural idea. They are no mere personification by the law of real entities, but are forthright creations of the legal imagination. They cannot. like corporations, bridge rivers, pierce mountains, unite cities, cross seas, control commerce, and accomplish all manner of other visible and tangible results. Yet, so misleading are the standard definitions of a corporation that they are more justly applicable to such truly fictitious persons as John Doe and Richard Roe than to the very real things which we call corporations. For instance, Chief Justice Marshall's famous definition of a corporation,[15] with the substitution of the masculine gender for the neuter gender and of the word "law" for "charter," accurately defines John Doe or Richard Roe. The common lessee, the definition would then read, is "an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, he possesses only those properties which the law of his creation confers upon him, either expressly or as incidental to his very existence. Those are such as are supposed to be best calculated to effect the object for which he is created." Are we, therefore, to conclude that the only difference between John Doe and a corporation is one of sex? No conception of the corporate entity which would define it in terms appropriate to the casual ejector or the common lessee can be correct.

ARTHUR W. MACHEN, JR.

[15] *Dartmouth College* v. *Woodward*, 4 Wheat. (U.S.) 518, 636.

THE STATE'S GUARDIANSHIP OVER CRIMINALS.

By Stephen H. Allen.*

The modern civilized State recognizes its duty to care for the insane, imbeciles, drunkards and paupers and by doing so to accomplish the double purpose of protecting both society from injury, and the unfortunate members of these classes, themselves, from the suffering which naturally results from their defects and weaknesses. The motives of the State in caring for such persons are purely benevolent, and the sole purpose is benefit to all concerned. A materially different attitude, however, is maintained toward moral defectives, who are usually regarded as enemies rather than wards of the State. Is there such a radical difference between moral and physical deficiency as to warrant this difference of sentiment when dealing with criminals?

Most of the offences listed in our criminal codes are clear infractions of the moral law of a somewhat aggravated character; some are mere infractions of governmental requirements, based on views of expediency. In some, and perhaps all, of the States there is an unnecessary multiplication of petty offences, subjecting offenders to small fines or brief deprivation of liberty, but as a whole, probably our criminal codes are satisfactory, in their definitions of offences, to the consciences of most people. Of the punishments prescribed, however, there is much criticism. The infliction of the death penalty is the substitution of public for private vengeance, and private vengeance appears to be the more excusable of the two. It is a most brutal behest of the State, that one of its citizens shall deliberately kill another, who is completely in its power and wholly at its mercy. In the nature of things the criminal who resorts to violence must be overcome by force, but, when resistance is overcome, what should be the attitude of the State toward the culprit? Should the State ever be revengeful or malicious toward any citizen? Ought it not always to act on principles of benevolence, of love toward all humanity, including even its criminals? The practice to which we have long been

* Member of the Topeka, Kan., Bar, and formerly Justice of the Supreme Court of Kansas.

accustomed is to single out a particular act and try the person charged with it for that offence. If he is found guilty a punishment deemed commensurate with that particular offence is inflicted. On the trial, the defendant may prove his good character in support of his innocence, but not in mitigation of the punishment.

Both from the standpoint of the welfare and rights of the criminal and of the needs of society, ought there not to be a double inquiry into the particular offence and into the general character of the person charged with it? A prudent parent, in correcting his child, is guided more by the known character of the offender than by the particular act complained of. A private citizen, in determining what his relations shall be with another, seeks information as to his general conduct and purposes. One guilty under certain mitigating circumstances of a serious crime might be employed and trusted with a feeling of security, while another who had never violated any penal statute might be altogether unsafe. Judge Gemmill in the Journal of Criminal Law and Criminology, well says: "The differences between virtues and vices of men are differences of degree only." Every man, who has a clear perception of his own weaknesses, knows his inclination to do wrong in certain directions. It may perhaps be safely said that no man knows just what temptation, through pressure of want and apparent safety, might induce him to be a thief of the money of one who would not suffer from the loss of it. How few of us refuse to use the advantages the law gives us to force others to give us their hard-earned savings without returning any fair equivalent. The crime of the robber, which is deemed one of the highest degree, has its counterpart in the conduct of the land grabber, the usurer, the extortionate surgeon or lawyer and many others that might be named. The embezzler may well claim kinship with the man who betrays the confidence of his creditor and squanders borrowed money, knowing that he cannot repay it. The common thief may well say that his act differs only in degree, but not in kind, from that of the tradesman who gives short weights or measures. The murderer even may point to the captains of industry, who needlessly expose their employees or others to avoidable dangers to save expense and increase profits; to the vendors of unwholesome foods and deleterious medicines; to reckless drivers of automobiles in streets and thoroughfares where

others are endangered, and numberless others, as exhibiting the same spirit of cruelty and disregard for human life. with no better justification than he has for the commission of a capital crime.

That there are persons who persistently commit crimes of a certain class every observer knows. Whether we attribute their conduct to an uncontrollable mania, or to a criminal bent, the result is the same. The protection of society requires surveillance and restraint. On the other hand, there are offenders without number, who reform themselves, with or without the aid of others, after the commission of a single act, which opens their eyes to the danger or immorality of criminal conduct. The fall now and then of someone who has long been regarded as a man of high character does not disclose the fact that many others have stood at the brink of sin, and been saved by some fortunate circumstance. There is, indeed, ample basis for true sympathy with criminals in all of us, for, if not criminals ourselves, we are nearly related to them. But this affords no argument against the employment of the most efficient means for their detection and restraint. It ought, however, to cause us to assume some share of the responsibility for crimes, which under some circumstances we might have committed, and to aid us in discovering means for saving others, as we have been saved, before they acquire the character of confirmed criminals. The system of registering births, marriages, deaths and convictions of crime through which a full public record of each family is preserved, and of keeping track of those who go from place to place, as is provided in Continental Europe, materially aids the officers in apprehending offenders. Our heterogeneous population, lax family ties and inordinate attachment to personal liberty, interpose many difficulties in the enforcement of the criminal laws not encountered in Europe, China or Japan. A country which allows such a full measure of liberty of action to the individual, needs higher standards of morality and a public sentiment which will exercise a moral restraint corresponding in power to the physical restraint of a paternal Government.

The necessity for some measure of forgiveness and for tempering justice with mercy is shewn by a consideration of the effects of rigid enforcement of the *lex talionis*. The simplicity of the rule. "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning.

wound for wound, stripe for stripe" (Exodus xxi: 23, 24, 25), and its seeming justice, have commended it to people like the ancient Babylonians and Hebrews, yet the frightful spectacle of maimed culprits is shocking to all sympathetic people. To disable men for useful employments tends to their moral degradation and imposes an added burden on society. It is manifest that the public interest requires not only better conduct, but increased efficiency from the criminal. Instead of cutting off the hand or putting out the eye, they should be trained to do better service. The activities of offenders should be checked only as they are exerted in wrong directions. The whole problem of reformation is the substitution of useful activities for harmful ones. It is the every-day task of prudent persons to turn their children from dangerous and destructive activities to safe and constructive ones. The task of society in dealing with its wayward members is similar. Reason and kindness are best wherever they can be employed successfully. Force and restraint must be resorted to when clearly necessary, but mere vengeance, never.

The Brahmin and Buddhist religions teach, that every act has its direct and certain effect on the status of the soul of the individual, and that every crime must be expiated and atoned for by good deeds; that no matter how low one falls, he must climb back; that misery and suffering will attend him until he purges himself of all his wickedness. While we may discredit the means thus recommended for attaining perfection, there is much in the fundamental doctrine worthy of acceptance.

The savagery of a criminal code under which boys were hung for petty larceny is no longer tolerated, but there are still many survivals of the fierce and brutal spirit of vengeance in our criminal laws, accompanied by total exemption from punishment of many serious faults.

Is it impossible to deal with each offender according to his needs, or must we still adhere in some measure to the spirit of the *lex talionis*? Is it wholly impossible, when a man is tried for crime, to ascertain what manner of man he is, and why he has committed the crime, as well as the mere fact of guilt or innocence of the particular charge? Would such an inquiry tend to complicate the issues and prolong the trials?

If it be said that an inquiry into the general character and conduct of a defendant is impracticable, it may be answered that similar inquiries in great numbers are made every day in connection with business transactions of all kinds by the parties interested; that in most cases there is no difficulty in ascertaining what a person's general character is: that the inquiry is not more complicated than, or essentially different from, one into the question of his sanity, or into the conduct of the parties in a divorce case. The essential fact that ought to be developed at every criminal trial is what manner of man is he who is accused. This being ascertained, the next question should be what must be done with him for the protection of society and his own welfare? Is it not because vengeance is still the purpose of the law, that defendants usually receive so much sympathy? If the purpose of the State were altogether benevolent, would not the friends of the culprits be more inclined to help than to hinder conviction and would not some criminals voluntarily submit to public discipline for their own betterment?

If, instead of condemnation to hard labour in close confinement for a fixed period as punishment for any one of a long list of wholly dissimilar acts, a system of treatment adapted to the character and needs of the culprit were authorized and full inquiry allowed into the habits and environments of the defendant, would not the much needed certainty of results in criminal trial be greatly promoted? Why not utterly discard our absurd technical forms of criminal indictments and informations and in their place allow a charge that the defendant murdered A and that he had also murdered B, C and D, stating time and place of each murder? Why not try a professional burglar, robber, pickpocket, shoplifter or swindler on a general charge that he is one, with a bill of particulars if required, giving the instances? Society is concerned in the question whether the defendant is a criminal needing attention. It is utterly disgusted with technical hair-splitting that shields criminals by false and wholly artificial rules of procedure.

The State should protect the law-abiding public from injury by criminals and also the innocent against groundless prosecutions and unmerited punishments. Under a military despot a multiplication of formal requirements in procedure tends to stay the hand of the oppressor and mitigate the evils of tyranny, but we are a free people, desiring only the public

good. The Constitutions of the United States and of the various States contain provisions prohibiting the issuing of warrants without complaint on oath. Indictments by a grand jury are also required by the Federal Constitution and by the Constitutions of most of the States in prosecutions for felonies. The Constitutions of some of the States require the use of certain formal words, which serve no real purpose in defining the offence, such as, "contrary to the form of the statute" or "against the peace of the State," the latter being a common law requirement also. Based on the constitutional requirements and the technical rules developed in England as it emerged from the semi-savage age of the Plantagenets, we have a long chain of arbitrary rules which serve no purpose except as dark alleys in which, if not properly guarded, a prisoner may escape from the clutches of the law. Where an indictment is required it must be found by a grand jury, constituted substantially as the law provides and with the concurrence of the requisite number of jurors, at a term of the Court having the requisite jurisdiction, held at a time and place authorized by law. "An indictment found by a grand jury at a term of Court held at a time unauthorized is a nullity and so are all proceedings thereon" (22 Cyc., 196). It must appear on the record that the indictment was found by the grand jury to be "a true bill," that it was returned by the grand jury in open Court and filed as a part of the record. These preliminaries serve no substantial purpose beyond that of guaranteeing good faith in making the accusation. In many cases they do not accomplish even this, and an indictment is sometimes based on the malice of a cowardly witness, who makes his false charge before the grand jury in secret. The fundamental error in the logic of appellate Courts which reverse convictions for errors in the preliminary proceedings on which the trial is based, lies in the want of connection between these matters of form and the justice of the conviction. The purpose of all the rules governing the presentment of a defendant for trial is to shield the innocent from the annoyance of a false accusation. If guilt is established at a fair trial, what can it matter how or by whom the charge was made?

One of the most prolific sources of reversals is the extreme nicety required in stating the offence. The purpose of an indictment is to notify the defendant of the charge made against him and to inform the Court as to the case to be

tried. In an indictment for murder it is necessary to charge an intent to kill, that the killing was done with malice aforethought, feloniously and wilfully, deliberately and premeditatedly. It must be set out what weapon was used, how it was used and how it produced death. If the weapon used was substantially different or if the fatal blow was struck in a substantially different manner from that charged, the variance is fatal and a conviction cannot stand. Among the chief reasons given for requiring a definite statement of the precise offence are that without it the Court cannot pronounce the proper sentence under the law, and the judgment rendered on it would not be a full protection against a future prosecution. These reasons are valid so long as we adhere to the system of measuring out a quantity of punishment deemed equivalent to the size of the crime. So long as the leading purposes of the law are vengeance and frightful examples to deter others from committing like crimes, much strictness will be looked on by lawyers and many laymen with favour. When the State deals with its habitual criminals as it does with its insane and other defectives, for the purpose of promoting their welfare, the necessity for so much nicety will cease. The theory on which we now prosecute persons charged with crime is, with some exceptions, that there must be a clear segregation of the acts connected with the offence charged from all other misdeeds and that the prosecution must stand or fall by the proof relating to those acts. This method has some foundation in reason as to the person guilty of but one offence. Doubtless there are many who, after living many years without having committed a serious crime, do deeds which shock the whole community. Probably a great majority of the homicides are committed by those who have never done or attempted the like before. Crimes which are due solely to the impulses of passion are often single offences. Is it not the fact, that so many of the crimes are the work of single offenders, that leads to our segregation of offences in charging crimes, and are not the acquittals which shock the public almost invariably acquittals of single offenders, or persons whom the jury believe to be so? If a majority of the crimes were committed by those who had never offended before, and never would again, if left unpunished, it may be said that the public ought not to overlook the crime, because to do so would be to encourage others to give way to their passions. Under the prevailing system in most jurisdictions

the alternative is conviction and a definite measure of punishment in the penitentiary, or forgiveness of the offence in some form and no punishment. That no grave crime should be wholly overlooked seems clear, but it is not clear that a vindictive punishment must follow conviction as a frightful example to deter others from doing the like.

A sentence of the culprit to the penitentiary for a fixed period, to be then turned loose hardened in crime by the schooling of the penitentiary, is not an intelligent treatment of his case. The sentence of the drunkard or petty offender to the rock pile or the work house for a few days may be repeated times without number without any permanent gain, while more judicious treatment, adapted to his character and needs, might cure the fault in those who can be reformed, and afford permanent protection against the incorrigible. There is about as much diversity of character among adult criminals as among children, and the same necessity for intelligent treatment of each according to his peculiarities.

The general welfare of society will best be promoted by the cure of criminal tendencies, where a cure is possible, and the interposition of permanent barriers between the public and those who are so depraved that reformation is impossible.

The Chinese Emperor, Kaung Hee, in his prefectory edict to the penal code of China, said: "The chief ends proposed by the institution of punishments in the empire have been to guard against violence and injury, to repress inordinate desires and to secure the peace and tranquillity of an honest and unoffending community." To accomplish the purpose expressed by Kaung Hee, of guarding against violence and injury, some must be forcibly restrained of their liberty, but what of the repression of inordinate desires? If there be any one human characteristic that is peculiarly American it is inordinate desires. For the imperial clan in China there is exemption from punishment; for the over rich in America there is no legal exemption but actual immunity. Conviction and punishment of those who combine to swindle by wholesale and gather spoils by millions under our system is practically impossible. Our nets may catch and hold the small fish, but the great sharks easily pass through. Could they as easily escape under a free investigation into their general course of conduct as they do from a technical indictment for a particular act?

When a trial is for the purpose of enabling the Court to "adjudicate criminal cases in accord with the social and physical needs of the offender, which in the long run is directly equivalent to the best financial and moral protection of society" (report of Committee A, American Institute of Criminal Law and Criminology), we shall have started on the road to the permanent elimination of crime. When the State intelligently and in a spirit of true kindness (not weak sympathy), performs its full duty, most of those who are now criminals will become useful citizens, and the rest will be permanently restrained from following their criminal specialties.

JEREMY BENTHAM, THE FIRST LAW REFORMER.

The eighteenth century had half run its course; George II. was still on the throne—"snuffy old drone from the German hive," as Wendell Holmes calls him; Samuel Johnson was "enriching the pages of the *Gentleman's Magazine*," to use Boswell's phrase; Lord Mansfield was developing the "law merchant" by a series of masterly decisions; John Wesley was hard at work on his missionary journeys through England; Rousseau was writing his epoch-making Origine des Sociétés, when in a quiet backwater in the City of London, in an old house in Red Lion-lane, close to St. Aldgate's Church, a little boy—small, shy, and sensitive—was growing up with little more companionship than that of his own thoughts. No star came and stood over his birthplace: no angels sang; yet in that youthful mind were germinating ideas from which was to spring a new social era, a rich harvest of beneficent legislation. The greatest happiness of of the greatest number is the motto of modern democracy, "the only possible, the only conceivable principle," as Sir H. Maine says, "which can guide legislation on a grand scale, and that it is so is chiefly due to Bentham's influence."

CHILDHOOD IN RED LION-LANE.

It was a curious little household in Red Lion-lane. The father was an ambitious attorney, worldly minded and pushing, who had inherited a good deal of money from his father.

a city pawnbroker. The mother was the daughter of a draper at Andover, a sweet, affectionate woman—"all the females of our family," says Bentham, "were amiable, kind-hearted, and generous"—but, like the wives and mothers of that day, her horizon was bounded by her home, the still-room and the best parlor. Little Jeremy was the pride of his parents' hearts, and by way of being an infant prodigy. One day when he was only three his parents, returning from a walk, found him perched on a high chair at a table, with a lighted candle on each side of him, absorbed in the reading of a huge folio of Rapin's History. The scene might do for a companion picture to that of the child Handel discovered by his family seated in his nightgown at an old harpsichord in the attic and discoursing sweet music in the stillness of the night. Little Jeremy had to fall back on Rapin, for no light literature was to be got. His mother, as a point of principle, refused him access to every book by which amusement might in any shape be administered, both parents thinking there was "contagion" in them. Picture his delight, then, when the first book which his French teacher, M. La Combe, put into his hands was a collection of fairy tales. It opened with the history of Les Petit Poucet and the Ogre Family; then there was Roquette à la Houpe, Cinderella, the Belle du Bois Dormante, the Chat Botté, and Fenette and her Naughty Sisters—Nonchalant and the other. "How did I joy," he says, "over the administration of poetic justice in its most admirable shape when Nonchalant, the wicked would-be seducer, having popped himself into the barrel full of razors and serpents which he had prepared for his intended victim, was himself rolled down the mountain in her place!"

THE YOUNG TELEMACHUS.

But a book which, if less entrancing than fairy tales, left a deeper impression on the moral side of his mind was that classic of juvenile French literature, The Adventures of Telemachus. "That romance," he says—he was only six or seven when he read it—"may be regarded as the foundation stone of my whole character: the starting post from which my career of life commenced. The first dawning in my mind of the principles of utility may, I think, be traced to it. One scene in particular left a strong impression. It is where Telemachus comes to Crete and finds them choosing a king.

Each candidate has to give his answers to certain questions on the right method of government. The answers of one came very near the doctrine of utility; but this candidate only came in second best. The prize was adjudged to Telemachus, whose notions seemed to me a short but still too long tissue of vague generalities, by which no clear impression was presented to my mind. It was too much of a piece with Lord Bacon's notion of a good government and his principles of legislation, ending with 'to generate virtue in subjects, *generare virtutem in subditis.*' I was disappointed, and the recollection of my disappointment still dwells in my mind." But the book fired his young ambition. Why, he said to himself, should not he be a Telemachus?

THE PHILOSOPHER OF WESTMINSTER SCHOOL.

A youthful philosopher revolving theories of government in this way at the age of eight was not likely to find the rough life of a public school a very agreeable environment, especially a philosopher of very small stature, and a weakling, as Bentham was—"the feeblest of feeble boys." Home, the old house in Aldgate, he used to say, was his earth. Browning Hill, Reading, where his grandmother lived, a charming old country house, with its village green, its gardens, orchard and venerable elms, its granary with the rusty old sword in it which the children used to brandish against the rats—this was his paradise. Westminster School was "hell," the instruction "miserable," the fagging a "horrid despotism." His father had fixed on Westminster for him because it was favoured by so many scions of nobility, and he wanted his son to "make his way among the great." One day the Duchess of Leeds, who had two sons at the school, sailed through the playground, and, seeing little Bentham at play with some of the other boys, she called him to her. "You know who I am?" "No, madam, no; I have not that honour." Something in the reply pleased the Duchess, and she asked him to go home with her sons, and the Duke introduced him to the company. "This is Bentham, a little philosopher," said he. Bentham's father, who was always dinning into his head the necessity of pushing forward, hailed this visit to the Duke of Leeds as the making of his son's fortune. Everything, he would say, was to be done by pushing. "Pushing," he would repeat, "pushing is the one thing needful." "But

pushing," as Bentham adds, "was not congenial to my character. Indeed, all his life he suffered severely from bashfulness. In the same spirit of push and making his son into a little man before his time, Bentham's father sent him to Oxford (Queen's College) at twelve.

BLACKSTONE'S LECTURES.

Here he profited as little as at the bear garden at Westminster. He found the society of the place either "stupid or dissipated." His tutor spent most of his time playing cards. Infidelity—and that of the coarsest type—was rife. But one lasting benefit he did derive from his sojourn at the university, springing from the stimulus of antagonism. He attended Blackstone's lectures—the lectures on which the famous Commentaries were based—and listened with "rebel ears" to the commentator's theories of "natural rights" and the origin of society. It was the desire to expose the fallacies which he thought he detected there which prompted his first work, A Fragment on Government, in 1776. Blackstone's complacent optimism, his belief in English law and the English Constitution as the best of all possible arrangements, exasperated the critical and reforming mind of Bentham. Blackstone's manner, too, gave him offence. He was a "formal, precise, and affected lecturer, cold, reserved, and wary, exhibiting a frigid pride." But theories of government had for the time to be put aside. His father was bent on his going to the bar and making a name. It is interesting in these days, when there is talk of reviving the "student's box" in Court, to find a place being taken for him as a student in the Court of King's Bench, Westminster. To secure the seat during term his father had to give the crier of the Court a fee of 7s. 6d. This seat, which was one of four, was immediately below the officers, under the Judges. In former days room had been reserved for two students on each side of the Judge on the bench, but Lord Kenyon put an end to this usage.

THE "DEMON OF CHICANE."

Besides providing him with a seat in the King's Bench, Bentham's father had put into his hands, to inspire him with legal ambition, the "Life of Lord Chancellor Clarendon," then just published; but its effect was quite neutralized by another "precious" autobiography which fell in his way

about the same time—that of Constantia Philips (Memoirs of a Courtesan). This young lady had suffered much at the hands of the law. There is an account in it of some scandalous proceedings at Doctors' Commons by which her husband set aside their marriage. "Ding-dong," says Bentham, "went the tocsin of the law. Tossed from pillar to post was the fair penitent—from Courts spiritual to Courts temporal, from Courts temporal to Courts spiritual, by Blackstone called Courts Christian. Lengthy, of course, was the vibration. Particulars of it are not remembered, nor matters it that they should be. What is remembered is that while reading and musing the Demon of Chicane appeared to me in all his hideousness. What followed? I abjured his empire. I vowed war against him. My vow has been accomplished, with what effect will be of knowledge when I am no more."

Deeply imbued with these prejudices against law and lawyers, "I went to the bar," says Bentham, "as a bear to the stake. On my being called I found a cause or two at nurse for me. My first thought was how to put them to death, and my endeavours were not, I believe, altogether without success. A case was brought to me for my opinion. I ransacked all the codes. My opinion was right according to the codes, but it was wrong according to a manuscript unseen by me and inaccessible to me—a manuscript containing the report of I know not what opinion, said to have been delivered before I was born, and locked up, as usual, for the purpose of being kept back or produced according as occasion served. This incident, the forerunner of so many others, added its fuel to the flame which Constantia had lighted up."

THE PHILOSOPHIC LIFE.

Naturally all this was extremely disappointing to his ambitious parent, who regarded him in the light of a "lost child," and a stepmother, whom his father gave him about this time, and with whom he did not get on, helped to widen the breach. Accordingly, the next scene shifts to a garret in Lincoln's-inn, where young Bentham is found living his own life on an allowance of £90 a year from his father, and getting gleams of practical philosophy from Montesquieu, Harrington, Beccario, and Helvetius. Most of all, Helvetius, the French philosopher, set him on the principle of utility, but it was from a pamphlet of Priestley that he got his catch phrase, summing up his philosophy, "the greatest hap-

piness of the greatest number." "In this phrase I saw," he says, "delineated for the first time a plain as well as a true standard for whatever is right or wrong, useful, useless, or mischievous in human conduct, whether in the fields of morals or politics." He felt as the discovery dawned upon him all the sensations of Archimedes, or of Cortez when he first gazed on the Pacific. "When I had sketched a few vague notions on the subject I looked delighted at my work. I remember asking myself, Would I take £500 for that sheet of paper? Poor as I was, I answered myself, No, I would not!"

UTILITARIANISM AND THE GREATEST HAPPINESS PRINCIPLE.

Now what was this great discovery of Bentham's which so elated him? Let us try and understand it. Looking around him, Bentham saw that men do not base their conduct on any settled principle. One man will say "my moral sense tells me" that such or such a course is right or wrong. Another says "my common sense tells me," or "my understanding." Another talks about the law of nature, right reason, the fitness of things. Another boasts himself one of the elect, knowing the will of God. And so on. All these may or may not be right in their conclusions. But how are we to know? says Bentham. It may be merely sympathy or antipathy. What we need is an external standard, and this standard or test Bentham found in utility. Actions are right or wrong—this is his formula—so far as they tend to make or mar the general happiness, the happiness of the greatest number. Utility is the "master key" to conduct, and by it "morals become as clear as mathematics."

John Stuart Mill tells us in his Autobiography how on reading these remarks of Bentham the feeling rushed upon him that all previous moralists were superseded, and that here indeed was the commencement of a new era in thought. But it is one thing to define in this way the goal of human endeavour, and quite another to determine the means by which it is to be attained. Bentham tries to work out his thesis by an elaborate analysis of pleasures and pains as the determining factors of human conduct. But here Bentham's system breaks down. The problem of conduct (even if we are prepared to admit it to be determined by a balance of pleasures and pains) is far too complex to be solved by *à priori* arguments. It can only be solved by societies finding out

from experience the general principles of conduct conducive to social welfare, working out their own salvation with much travail of experiment—success and failure. This is what societies have done in the past, and are still doing—summing up the results in their moral systems, their civil and criminal codes. Bentham's merit lay not in his barren analysis of pains and pleasures, but in his concentrating attention on the end to be achieved. But why, if this is so, it may be asked, is Bentham to be credited as with an epoch-making discovery? The greatest happiness of the greatest number is a principle as old as the Twelve Tables. Is not *Salus reipublicae suprema lex esto* writ in the forefront of them? And therein better expressed, because the welfare of the people is a sounder ideal than the happiness of the people. Had not the test, if not the very phrase, been already used by Helvetius and Hume and Priestley. By what right. then, did Bentham appropriate it? The answer seems to be that with Bentham the principle had all the glamour of a new discovery, because it synchronized with the remarkable spread of the democratic principles at the end of the eighteenth and beginning of the nineteenth century—the doctrine of the rights of the people, the new spirit of humanitarianism which was abroad. Government was thenceforth based on a definite principle. It was to be government of the people by the people for the people. All over the Continent Bentham's writings—in the French dress of Dumont's text—were hailed with enthusiasm as exhibiting the philosophic basis of popular rights and the true goal of all sound legislation. He was made a citizen of France, and when, years afterwards, he visited Paris he received the most flattering attentions. On one occasion when he entered a Court of justice all the barristers rose up in token of respect, and the President seated him at his right hand. It is this championship of democracy which gives him the right to the title, by which he described himself in his last will, of "the founder of the greatest happiness system in morals and legislation."

AN INVITATION TO BOWOOD.

While revolving these high themes of social regeneration in his Lincoln's-inn garret Bentham received a visit from no less a personage than Lord Shelburne, the then prime minister, afterwards Marquis of Lansdowne. Lord Shel-

burne had been much impressed with reading Bentham's Fragment on Government, and he invited the author to come and pay a visit to Bowood. There he was introduced to a large circle of distinguished men and charming women. There he met Lord Camden, Dunning (afterwards Lord Ashburton), and Mr. Pitt. Pitt, he records, was "very good-natured." "I was monstrously frightened at him," he adds, "but when I came to talk to him he seemed frightened at me." The ladies petted him, and Lord Shelburne made him read them some of his dry metaphysics, to which they listened with feminine docility. To keep a tame philosopher on the premises had long been a fashion on the Continent.

But philosophers are human; they are not proof against the tender passion, and Bentham, like Teufelsdorf, found his Blumine at Bowood in the person of Miss Carolina Fox, a charming girl, the niece of his host. Like Teufelsdorf, his suit was unprosperous, but he could say with Gibbon, "I feel dearer to myself for having been capable of this elegant passion." It was the one romance of Bentham's life, and at eighty-two, after fifty years of dreary codifying, the memory of this early attachment was as fresh and tender as ever. How true it is—

> "You may break, you may shatter the vase, if you will,
> But the scent of the roses will cling round it still!"

Bentham was always grateful to Lord Shelburne for his recognition and for the kindness he received from the household at Bowood. It came just at the time when he was, as he says, "cowed by past humiliation." It opened his heart, unsealed the fount of feeling in him. Lord Shelburne "made him a man again, raised him from the bottomless pit of humiliation. He made me feel I was something." It encouraged him to persevere with his life work.

LAW REFORM.

He had formulated his great fundamental principle—his *novum organum*—and now he set himself to apply it to an all-round methodical reform of the constitution, of the civil and criminal law (particularly the principles of punishment), of the law of evidence, of political economy. "A law maker by trade" is what he calls himself. Looking back, it is

remarkable how many of the reforms which he urged are to-day accomplished facts or on the way. Among the political reforms which he advocated were universal suffrage, annual Parliaments, the payment of members, and vote by ballot. In the matter of the civil law his constant aim was the simplification of law and procedure—slowly realized in the Common Law Procedure Acts and the Judicature Acts—to the confusion of technicality and chicanery, and for this end he laboured incessantly at codification. At eighty-two he was still "codifying like a dragon." But the most valuable part of his work is his examination of the true principles of criminal law or penal legislation—a country then unexplored, which he carefully mapped out. One of his pet projects for the reformation of offenders was a model prison, which he called the Panopticon, so constructed that a person placed at the centre could see what every inmate was doing.

FORD ABBEY: A PERSONAL DESCRIPTION.

On his father's death Bentham had succeeded to a considerable property. He had always loved the country, a garden, and flowers, and now he could gratify his tastes he took a fine place at Chard, in Somersetshire—Ford Abbey. It was a superb residence, dating from the twelfth century, with chapel, cloisters, and corridors, a hall 80 ft. long by 30 ft. high, and a great dining parlor. The grounds in which the abbey stood were what the French call *riant* and secluded, unbrageous, and full of the sound of falling waters. Here he was visited by many friends, among others by the elder Mill, his most devoted disciple, with his son, John Stuart Mill, and it was Ford Abbey which suggested to the younger Mill, the striking observation in his Autobiography that "Nothing contributes more to nourish elevation of sentiment in a people than the large and free character of their habitations. The Middle Age architecture, the baronial hall, and the spacious and lofty rooms of this fine old place, so unlike the mean and cramped externals of English middle-class life, gave the sentiment of a larger and freer existence, and were to me," he says, "a sort of poetic culture." Another visitor to Ford Abbey was Sir Samuel Romilly, and his description is worth quoting as the best picture of the sage's mode of life. "We found," he says, "my old and valued friend passing his time, as he has always been pass-

ing it since I have known him, which is now more than thirty years, closely applying himself for six or eight hours a day in writing upon laws and legislation and in composing his civil and criminal codes, and spending the remaining hours of every day in reading or taking exercise by way of fitting himself for his labours, or, to use his own strangely invented phraseology, 'taking his ante-jentacular and post prandial walks' to prepare himself for his task of codification. There is something burlesque enough in this language, but it is impossible to know Bentham and to have witnessed his benevolence, his disinterestedness, and the zeal with which he has devoted his whole life to the service of his fellow-creatures without admiring and revering him." Battledore and shuttlecock was his favourite indoor pastime. Bentham's out-of-doors get-up was distinctly peculiar. He wore a plain brown coat cut in the Quaker style, light brown kersemere breeches, over the knees of which he usually exhibited a pair of white worsted stockings; list shoes, and merino-lined gloves. The whole was surmounted by a narrow-brimmed straw hat of most grotesque and indescribable shape, strongly contrasting with the sobriety of his appearance, from under which his venerable locks floated over his bare neck and collar and down his back. He never went out without his stick "Dapple" for a companion, and he wended round the walks of his garden—or "circumgyrated it," to use his own phrase—at a pace which was more than a walk, but not quite a trot.

THE HERMIT OF QUEEN'S SQUARE.

Later in life he settled in London at Queen's-square-place in a retired house leading out of Birdcage-walk, St. James' Park. There was a sequestered garden to the house. Shrubberies ornamented the courtyard. Flowers bloomed on the window-sills. It was a little oasis, and the seclusion of it, with the simple, retiring habits of the owner, got Bentham the name of "the hermit of Queen's-square." But there was nothing morose or unsocial about him. He entertained friends freely, always remembered their special tastes, and pleased himself with ministering to them. But time was precious to him, and he would not suffer it to be frittered away in idle chatter. also a certain bashfulness clung to him all through life. Miss Edgeworth's father called once to see him. "Tell Mr. Bentham," he said to the servant. "that

Mr. Richard Lovell Edgeworth desires to see him." The message came back: "Tell Mr. Richard Lovell Edgeworth that Mr. Bentham does not desire to see *him*."

He was very fond of "pussies," as he called them, as of animals generally. One particular favourite he had of the tabby kind, of whom he used to boast that he had "made a man" of him. This puss got knighted, and rejoiced in the name of Sir John Langhorne. In his early days he was gay and frisky, but later on he became sedate and thoughful, laid down his knightly title, and was installed as the Rev. John Langhorne. He gradually obtained a great reputation for sobriety and learning, and a doctor's degree was conferred upon him, and he became the Rev. Dr. John Langhorne. He was supposed to be very near a mitre when he died. From all which we may see that Bentham, besides being a great jurist, was an unconventional person with a keen sense of humour. A striking trait in him is his splendid self-confidence. Thus is the strain in which he addresses the Duke of Wellington in 1828: "Lord Duke, listen to me. Your name will—ay, shall—be greater than Cromwell's. Already you are, as in his day he was, the hero of war. Listen to me and you will be what he tried to be, but could not make himself—the hero of peace, of that peace which is the child of justice." If the Duke would not listen, if Bentham could not see "his plays acted," he comforted himself with the reflection that after his death he would be enthroned by mankind as a benevolent "despot."

When the end drew near he asked his doctor if there was any hope. The doctor was constrained to say there was none. "Then minimize pain," said Bentham, with characteristic decision. Leaning on his elbow in an attitude of profound and solemn meditation, "What a multitude of things there are," exclaimed the dancing master Marcel, "in a minuet!" May we not now add, says Bentham at the close of his Morals and Legislation, "and in a law"? Yes! And here is Bentham's true title to fame. He was often right, often wrong; but he forced men to reflect on the problems of law and legislation, to see how much there is in a law—forced them to ask themselves whither they are going, and why.—*Law Times* (Eng.)

SIR W. S. GILBERT AND THE LAW.

In no section of the community will the tragic death of Sir W. S. Gilbert have created a deeper feeling of regret than in the legal profession. He was one of the most distinguished of the many men who practised at the Bar before they wrote for the stage. Called to the Bar at the Inner Temple in 1863, he joined the Northern Circuit, but the measure of success he gained as an advocate was not large enough to weaken his desire to become a dramatist, and at the end of four years he abandoned all idea of a prosperous career in the Courts. It is not only, however, because Sir William Gilbert was a member of the Bar that the legal profession has a special interest in his incomparable series of "Savoy" operas. Not a few modern writers for the stage have been lawyers. Mr. Sydney Grundy and Mr. Anthony Hope were practising barristers before they became playwrights, and Judge Parry and Mr. Hemmerde, K.C., continue to shew that the pursuit of both professions may be combined. But none of the dramatists with a legal training have turned it to better use. Sir William Gilbert was never happier than when aiming his shafts of wit at the members of the profession of which he was once a practising member.

> **The Law is the true embodiment**
> **Of everything that's excellent.**
> **It has no kind of fault or flaw,**
> **And I, my lords, embody the law—**

so sings the Lord Chancellor in "Iolanthe," perhaps the best of all Sir William Gilbert's legal characters. Who but a legal dramatist could have created the problem which vexes a "highly susceptible Chancellor" who falls in love with a ward of Court?" "The feelings of a Lord Chancellor who is in love with a ward of Court are not to be envied. What is his position? Can he give his own consent to his own marriage with his own ward? Can he marry his own ward without his own consent? And if he marries his own ward without his own consent, can he commit himself for contempt of his own Court? And if he commit himself for contempt of his own Court, can he appear by counsel before himself to move for arrest of his own judgment? Ah, my lords, it is indeed painful to have to sit upon a Woolsack which is stuffed with such thorns as these."

Upon the Bench itself Sir William Gilbert seldom allows his satire to play, though Ko-Ko, in "The Mikado," includes in his famous list of social offenders who never will be missed, "That Nisi Prius nuisance, who just now is rather rife, the Judicial Humourist." The Judges of the Savoy operas are much given to indulging in reminiscences of their forensic days, and Sir William Gilbert is accustomed to make the Bench the vehicle of his satire on the Bar. It is, for instance, the Lord Chancellor, in "Iolanthe," who recalls the "new and original plan" on which, "when he went to the Bar as a very young man" he determined to work:—

Ere I go into Court I will read my brief through
(Said I to myself, said I),
And I'll never take work I'm unable to do
(Said I to myself, said I).
My learned profession I'll never disgrace
By taking a fee with a grin on my face,
When I haven't been there to attend to the case
(Said I to myself, said I).

Even the Judge in "Trial by Jury"—one of the most delightfully whimsical of the Gilbertian plays—is mainly concerned to shew how he reached the Bench. Somebody once observed that one of three things was essential to a barrister's success—he must choose an attorney for his father, or marry an attorney's daughter, or be a miracle. It is the second of these things of which Sir William Gilbert chose to make fun. The Judge in "Trial by Jury" fell in love with "a rich attorney's elderly, ugly daughter," who might "very well pass for forty-three." In the dusk with a light behind her, and the rich attorney, faithful if ungallant, promised that he should "reap the reward of his pluck":—

The rich attorney was good as his word,
The briefs came trooping gaily,
And every day my voice was heard
At the sessions or Ancient Bailey.
All thieves who could my fees afford
Relied on my orations,
And many a burglar I've restored
To his friends and his relations.

Apart from the counsel in "Trial by Jury," who do not take a conspicuous part in the amusing proceedings, "Sir Bailey Barre, K.C., M.P.," in "Utopia," is the only member of Sir William Gilbert's branch of the profession who appears in his plays, and even here it is not the honourable and learned gentleman himself who says most of the satirical things of the Bar. It is Princess Zara who makes this interesting contribution to the ethics of advocacy:—

A complicated gentleman allow me to present,
Of all the arts and faculties the terse embodiment,
He's a great Arithmetician who can demonstrate with ease
That two and two are three, or five, or anything you please;
An eminent Logician who can make it clear to you
That black is white—when looked at from the proper point of view;
A marvellous Philologist who'll undertake to shew
That 'Yes' is but another and a neater form of 'No.'

Despite the failure of solicitors to help Sir William Gilbert to realise his early ambition to become a successful advocate, they come in for a smaller share of satire in his plays than do the members of the Bar. There is, it is true, a notary in "The Sorcerer," who, "dry and snuffy, deaf and slow," is "everything that girls detest," but he is merely an incidental and conventional figure in a romantic scene. On the whole, the solicitor branch of the profession appears in a favourable light in the Savoy operas. Long before either Lord Wolverhampton or Mr. Lloyd George obtained a high position in the State, the author of "Pinafore" recognized the excellent training a Cabinet Minister may receive in a solicitor's office. Sir Joseph Porter attributes his rise to the office of First Lord of the Admiralty to the energy with which, while an office boy in a solicitor's office, he "polished up the handle of the big front door."

In serving writs I made such a name
That an articled clerk I soon became;
I wore clean collars and a brand new suit
For the pass examination at the Institute.
And that pass examination did so well for me,
That now I am the Ruler of the Queen's Navee!

There are misguided people who believe that a solicitor's office should be shunned. Sir William Gilbert—who, by the way, was a Justice of the Peace and frequently sat with the Middlesex magistrates—was not among these disbelievers in litigation. In "The Mountebanks," where he explains why Ophelia ought to have brought a breach of promise action against Hamlet, he says: "Ophelia to her sex was a disgrace, whom nobody could feel compassion for. Ophelia should have gone to Ely Place, to consult an eminent solicitor." In "The Grand Duke" there is a notary—a much more attractive being than the "dry and snuffy" practitioner in "The Sorcerer"—who praises a Prince who "passed an Act short and compact, which may be briefly stated."

Unlike the complicated laws
A Parliamentary draftsman draws,
It may be briefly stated.

These are practically the only lines in which Sir W. S. Gilbert chose to satirise the law rather than the lawyers. The anomalies of the law were, of course, rather too serious a theme for a writer whose primary object was to be amusing. There is, however, more than enough in the Savoy plays of special and piquant interest to the legal profession to secure for their author, with his great mastery of metrical skill, an enduring place in the memory of its members.

THE HAGUE CONFERENCE ON BILLS OF EXCHANGE.[1]

[Contributed by Sir MacKenzie Chalmers, K. C. B., K. C. S. I.]

The International Conference on the unification of the laws relating to bills of exchange, held at the Hague in June and July, 1910, makes a new and hopeful departure in private international law. If there is one thing more than another that facilitates international commerce it is uniformity of commercial laws, and this principle applies perhaps in a greater degree to bills of exchange than to any other mercantile instrument or transaction. Though cable transfers are superseding bills in certain limited branches of trade, bills of exchange are still the main international currency, and their usefulness as currency largely depends on their uniform treatment by the laws of the different countries through which they are negotiated. No fitter subject could have been chosen for the new experiment.

The Conference was convened by the Netherlands Government, at the instance of Germany and Italy, and was attended by accredited delegates from thirty-five nations, some of them having full powers while others had more or less limited instructions (Blue-Book, pp. 1 and 26). Much good preliminary work has been done by private associations, such as the Association of Private International Law, but I think this is the first occasion on which the governments of all the

[1] See Foreign Office Blue-Book, "Correspondence relating to the Conference on Bills of Exchange," October, 1910. [Cd. 5224.]

great mercantile Powers have combined officially to secure the unification of an important branch of commercial law.

The Conference was an interesting one. It was not composed of "jurists," who, according to Lord Bramwell, are worthy persons knowing a little about the laws of all countries except their own. The delegates included merchants, bankers, practising lawyers, Judges, ministers of state, and diplomatic representatives. To take, as an example, bankers, who perhaps know as well as any one where the bills of exchange shoe pinches. England was represented by Mr. F. Huth Jackson, a director of the Bank of England and president of the Institute of Bankers. The United States sent Mr. C. A. Conant, a New York banker and a well-known writer on banking matters. The German delegation included M. Fischel, a partner in the great Berlin bank of Mendelssohn & Co.; the French delegation included M. Picard, the general secretary of the Bank of France; and the Austrian delegation included M. Hammerschlag, the manager of the Imperial Credit Society of Vienna.[2] The Conference lasted five weeks and sat continuously. The language used throughout was French, and full discussion was no doubt handicapped by the fact that only three out of the thirty-five nations represented (viz., France, Belgium, and Switzerland) were speaking their own tongue. But where so many tongues were collected together, any other rule would have been impossible.

The Questionnaire (Blue-Book, p. 4), which was circulated three months before the Conference met, raised eighty-nine points for discussion, and in the course of the Conference a good many more were raised. Some questions were debated at considerable length, while others, and not always the least important ones, were sometimes perfunctorily and inadequately discussed. For example the German rule that the holder of a bill, who claims through a forged indorsement, gets a good title, if he takes the bill in good faith, and the indorsements appear to be in order, was passed without discussion, except for the dissent of England and the United States. The English rule that the duties of the holder, as to presentment, protest, and notice of dishonour, are not absolute duties, but duties of reasonable diligence, found no defenders except ourselves.

[2] See Blue-Book, p. 115, for list of delegates and their qualifications.

The instructions to the English delegates were precise:

As a general rule the British delegates will not hold out any hope that English rules of law are likely to be substantially modified and brought into conformity with continental rules, particularly in cases where the English rule prevails, not only in the United Kingdom, but also throughout the English-speaking world. . . There are, nevertheless, certain points on which the English law is doubtful, or where there are points of divergence between the different English-speaking communities. In such cases it would evidently be desirable if a uniform law could be arrived at, and the uniformity of the rule is probably of more importance than the nature of the rule itself (Blue-Book, p. 20).

Throughout the Conference the delegates from England and the United States took the same line, and worked harmoniously together. The Anglo-American position is this: For practical purposes we have now got a uniform law of bills of exchange throughout the whole of the English-speaking communities. The Bills of Exchange Act, 1882, has been adopted, with or without small variations, by all our important colonies. The Indian Negotiable Instruments Act, though drafted on a different plan from the English Act, accords with it in substance; and if the Indian rule differs from the English rule in any respect, it is due to the accidents of drafting, and not to intentional divergence. In the United States the Federal legislature has no jurisdiction over bills of exchange. But some years ago the Commission on Uniform Laws drew up a model law of negotiable instruments, and this model law has now been enacted by the legislatures of thirty-five States and in four territories (Blue-Book, p. 29). The American Negotiable Instruments Law differs in arrangement from the English Act, but accords it with it in principle, and in many cases uses identical words. The most important point in which the Anglo-American laws diverge is the maturity of bills payable otherwise than on demand. Nearly all the States in the United States and some of the English colonies, following the continental lead and the dictates of convenience, have abolished days of grace. The rule that when a bill falls due on a common law *dies non* it is payable on the preceding day, while if it falls due on a bank holiday it is payable on the succeeding business day, is an eccentricity peculiar to the United Kingdom, and the sooner it is altered the better.

The English delegates had no hesitation in recommending that days of grace should be abolished, and that when a bill falls due on a non-business day it should in all cases be payable on the next succeeding business day (Blue-Book, pp. 78 and 81). The fact that we have now got a uniform system throughout the English-speaking world makes us very loth to consider changes in our law, even though they may not be undesirable in themselves. Apart from the dislocation of business that follows from changing an old and well-known rule, we dislocate the whole Anglo-American system. If, for example, England or one of the States of the United States adopts some continental rule (*e.g.*, the requirements that every dishonoured bill and note should be protested), the uniformity of the Anglo-American system is broken up until some fifty to sixty legislatures have agreed in approving the change. But an International Conference can only proceed on the principle of give and take. The nations which have nothing to give have rather to stand aside from the action of the piece, and take the part of the chorus in a Greek play. We could only argue in favour of our rules on abstract principles of convenience.

From the Anglo-American point of view the procedure adopted at the Conference was unfortunate. When questions were raised on which opinions differed, divisions were taken on the principle of "one nation one vote," and the question was decided by simple majority of votes. A good many points were carried by very small majorities. When great commercial interests are at stake, it is not very satisfactory that the combined vote of England and the United States should be neutralised by the votes of Hayti and Montenegro. But it is difficult to see what other system could have been adopted. If votes had been apportioned in proportion to the population represented by the various delegations, no doubt matters would have been equalised as between the Anglo-American and the continental systems, but China would have had an overwhelming vote. Votes proportioned to commercial interests could only be based on unreliable estimates, and would not, I think, be acceptable to our continental friends.

Early in the Conference the question was raised whether an attempt should be made to draft a Uniform Law for general adoption, or whether the Conference should confine itself to discussing the points of divergence in the various

national laws, and then formulating resolutions as to the rules to be adopted. We, of course, were in favour of the latter plan. We should have liked to have had the resolutions formulated with the names of the countries which supported or opposed them, and a brief abstract of the reasons for or against them. But the almost unanimous opinion of the Conference was in favour of the former course. In the result the deliberations of the Conference have produced a draft Convention and draft Uniform Law for general adoption. Thirty-one nations signed the Protocol agreeing to the Convention, three nations have not signed, but have made no protest. England and the United States formally declared that they could not become parties to any such scheme (Blue-Book, pp. 28 and 149). The draft Uniform Law is to be circulated for criticism to the various Governments which took part in the Conference, and a further Conference is to be summoned at The Hague next September to consider criticisms and finally pass the Uniform Law.

The procedure by which the Uniform Law was evolved was as follows: The Conference opened with an informal discussion in plenary session of the eighty-nine points raised by the Questionnaire. The Conference was then split up into five sections, each containing the delegates of seven nationalities. The points raised by the Questionnaire were then considered *seriatim*, and new points were allowed to be raised. The opinions of the different nations were elicited, and then the report of the proceedings of each section was presented to the central committee. The central committee was composed of the five presidents of the sections, the five *rapporteurs*, five expert members, *i.e.*, bankers and merchants, and five other selected members, representing in all about fifteen nations out of the thirty-five. Mr. Huth Jackson and myself served on the central committee, but our United States colleague unfortunately did not. Taking as the basis of its discussions the reports of the five sections, the points raised were again gone through, and when opinions differed, votes were taken, and the questions were decided by simple majorities. The conclusions of the committee were then drawn up by the very able *rapporteurs* of the committee, MM. Lyon Caen and Simons. They were presented in print within two days of the termination of the committee, not as resolutions, but in a series of articles forming a complete draft law (Blue-Book, pp. 28 and 48.)

These articles were then brought before the Conference in plenary session, and were passed in one sitting without amendment and with very little discussion. The committee on Private International Law then submitted their report, and submitted three draft articles, which were agreed to by the Conference. These articles only deal with conflicts of law, between the parties to the Convention, on points which by the Convention are left to be settled by national law, *e.g.*, whether a bill must be presented on its due date, or whether, as the Uniform Law provides, the holder may present it either on its due date or on either of the two succeeding days. The *rapporteurs* of the central committee, and the *rapporteurs* of the International Law Committee (MM. Renault and Kriege) were then instructed to incorporate the three articles on the conflict of laws into a preliminary draft of the Uniform Law, making at the same time any necessary drafting alterations. The next day the combined work of the four *rapporteurs* was presented to the Conference in the form of a draft Convention and Uniform Law, and this draft, after some desultory discussion, was adopted by the Conference without division. England and the United States merely stated their reasons for standing aside (Blue-Book, pp. 28).

To any one who knows the difficulty of drafting a code, the work of the *rapporteurs* of the central committee, who produced a complete draft code immediately after the conclusion of the labours of the committee, must seem like a modern miracle. But there is an explanation. The Germans, with their usual thoroughness and forethought, had prepared and circulated a draft code (in French and German) before the Conference met. On the whole the votes of the central committee, largely influenced by the tact and ability of M. Simons, one of the German delegates, supported the views of the German draft, and so that draft was capable of being used as a basis, the necessary amendments being engrafted on to it. Still, even with this great aid, the *rapporteurs* accomplished a notable piece of work.

This year the Conference will meet again to complete its work, but I venture to think that England and the United States must still continue their attitude of benevolent neutrality. Some of the more obvious reasons for this attitude may be briefly indicated.

The draft Uniform Law differs very considerably from the Anglo-American system. Mr. Huth Jackson and myself

have drawn up a memorandum commenting on thirty-nine questions of more or less importance where the two systems differ (Blue-Book, p. 75), and a prolonged comparison of the Uniform Law with the Bills of Exchange Act will probably disclose a good many more. In several cases the rules of the Uniform Law appear to us to be commercially inconvenient, as for instance the rule which nullifies a bill which is issued undated, it may be by accident, the rule that the holder cannot refuse a partial acceptance, and the complicated rules as to notice of dishonour. Again, the Uniform Law, quite rightly, applies alike to inland and foreign bills and notes. It would be highly inconvenient for the countries which adopt it to have each two codes, one applicable to foreign and the other to inland bills. But we should object in England to have every dishonoured bill and note protested, and we should also object to the commission of 1-6 per cent. in addition to the ordinary damages. The rule that every holder of a bill is entitled to demand a set, even though the bill is issued as a solo bill, is capable of vexatious abuse. The general attitude of the continental codes differs from the English view. Our English law in the main reproduces the usages of bankers and traders. The continental codes have been framed for bankers and traders by their respective legislatures. Speaking broadly, the continental codes tell bankers and traders what they may do. They start with a normal trade bill and then carefully police it throughout its whole career. English law tells its citizens what they may not do, but subject to the avoidance of things prohibited, leaves them free to make any arrangements they like.

But apart from differences in the two laws, there are cogent reasons why we should not become parties to the Convention. It is proposed that the nations who adopt the Uniform Law should adopt it, not by independent legislation, but by convention, that is to say it must be adopted in its entirety, without addition, derogation, or alteration, except so far as certain points are by the law itself left open to restricted modification by the national legislatures. The contracting parties are as far as possible to adhere to the Convention for their colonies as well as for their own territories. They may enact the law either in French or by translation, but in case of doubt, the original French document is the authorised version. No modifications in the law can be made for three years, but after that time any five contracting States

may require the Netherlands Government to summon a conference to consider alterations (Blue-Book, pp. 120-5).

One cannot imagine the English Parliament adopting a code made on the Continent at a Conference where the English vote was of little account and accepting it without powers of revision or effective discussion. The only points that could be debated would be (1) acceptance or rejection as a whole, and (2) the correctness of the translation. It would be amusing, if not instructive, to hear the House of Commons discussing the exact English equivalent of French technical terms and phrases.

But assuming that Parliament could be induced to swallow the Uniform Law blindfolded, the result would not be complete uniformity. On the Continent the Uniform Law would be fitted in to the existing commercial codes, and would be administered by tribunals of commerce as a part of those codes, and with the appropriate special machinery. The decisions of those tribunals do not, I believe, constitute binding precedents, and the somewhat loose, though pregnant, provisions of their codes seem to be treated rather as authoritative instructions to the Judges than as we regard an Act of Parliament. In England the Uniform Law, if adopted, would be immersed in the common law, and would be construed by the civil Courts like any other statute, in accordance with the highly technical rules of statutory construction. Our Courts minutely weigh and criticise every word and phrase of a statute, dealing with it as if it were a matter of verbal inspiration. The fact that the authorised version would be the French original at the Hague would add to the complication. There is also another objection. The Uniform Law deals only with bills of exchange and promissory notes payable to order. It has no application to cheques or to promissory notes payable to bearer. We should, therefore, require separate enactments to deal with these instruments, and this, to say the least of it, would be embarrassing. The reason why the Uniform Law is so restricted appears to be this. The continental laws look very much askance at instruments payable to bearer, and in some countries notes to bearer are absolutely prohibited. Again, with us a cheque is merely a bill of exchange, drawn on a banker, and payable on demand. All its special incidents flow from the fact that it is drawn on a banker. On the Continent a cheque is not necessarily drawn on a banker, and is not a bill of ex-

change. It has some of the incidents of a bill of exchange, but is really an instrument *sui generis*, and of comparative novelty.

But though England and the United States cannot become parties to the Uniform Law, it by no means follows that the Conference will not be productive of great good. In the first place the friendly interchange of views between the delegates of so many nations is profitable in itself. In the second place we hope that in September next the nations which have approved the draft Convention will adopt the Uniform Law. In that case a great step forward will have been made. Instead of the present multiplicity of laws relating to bills of exchange we shall have only two great systems, namely, the Anglo-American and the Continental. That alone ought greatly to simplify the transactions of international commerce. We may fairly hope, too, that when these two great rival systems are brought face to face, many of the points of conflict will gradually be removed. On some few points the rules of the Uniform Law are more convenient and equitable than our rules, and we should improve our law if we adopted the continental rule (Blue-Book, pp. 75 and 81). On some other points, one rule is as convenient as the other, and it might be worth while to adopt the continental rule for the sake of uniformity, if the other nations would be willing to act on the principle of give and take. But perhaps it is well not to be too sanguine in these matters. It is difficult to induce Parliament to make any change in the law where the impetus of party prejudice or passion is wanting. Moreover, any change in accustomed rules creates temporary disturbance in business. Most people are agreed that it would be a vast improvement if we adopted the decimal system in our coinage, weights, and measures. Posterity certainly would bless us if we did. But then posterity has done nothing for us. We firmly decline to put ourselves about for the benefit of posterity when posterity cannot do anything to repay us for our trouble.

THE IDENTIFICATION OF A MARK.*

Judges and lawyers have long been wrestling with two questions which still seem to be not clearly understood. In their efforts to determine them, they have often waxed so warm as to lose their mental equipoise, the results being the perpetration of absurdities and the making of arbitrary and unjust rulings.

The two questions can be stated and answered epigrammatically, as follows:

Q. When is a mark not a mark? A. When it is a writing.

Q. When is an expert witness not an expert witness? A. When he is testifying to facts.

For the present purposes, "mark" is to be taken as meaning a character made by an inked pen operated by a human hand, and consisting of a single straight stroke, or of two or more disconnected straight parallel strokes, or of two straight strokes crossing each other. "Expert witness," on the other hand, is to be taken as meaning a person who has been admitted to testify as one specially skilled in the examination of questioned documents, including, of course, writings.

Let us consider the "expert witness" question first, and inquire as to the real character of his testimony.

It is universally conceded that when an expert testifies to an opinion entertained by himself regarding the matter before the Court, he testifies strictly and solely as an expert; his opinion is only receivable as an aid to the jury, who may, if they choose, arbitrarily repudiate it altogether and substitute their own absolutely unskilled judgment for it. But this status exists only in so far as the witness is actually testifying to an opinion

It is also settled that an expert can only testify to an opinion which is based upon facts in evidence, or which will be put in evidence in the case, and it is very properly held that all the facts upon which his opinion rests, should be before the Court. Now when it comes to a case of disputed writing, the foundation facts are the writings themselves;

* From Central Law Journal.

and these foundation facts contain within themselves a multitude of other absolutely controlling facts. The foundation facts—*i.e.*, the writings themselves—are visible to the Court and jury, and many of the other facts contained therein—*e.g.*, characteristics of the writings — are also likewise visible; yet nevertheless an expert witness may himself always testify to those facts if he is basing any opinion upon them; and in so far as he is so testifying to those facts, he is testifying not strictly as an expert, but just like an ordinary witness, and with the same degree of responsibility, and the jury is not at liberty arbitrarily to disregard such evidence given by him.

If therefore the expert can thus testify to certain of the facts contained in the writings themselves, and which the Court and the jury can see for themselves, when their attention is directed thereto, then it necessarily follows that such expert not only can, but must, go further, and testify to all the facts contained in the writings (if he would base an opinion on them) even though many of those facts be such that neither Court nor jury would have either the ability to ascertain them or the power to see them, for themselves. While the expert still is describing facts existing in the writings, he is still testifying as an ordinary witness to those facts, and the jury must so treat his testimony; and it is while he is actually doing this, that this expert witness is legally not an expert witness, although he may have been called and qualified as such. An every-day instance of such a condition is found in the numerous cases where a question is to be determined involving the composition of a given substance. The substance in question may be actually before the Court and jury, yet they must rely on an analysis of it made by some competent person, who then testifies as to its component parts as a skilled witness, but not as a technical expert witness. So long as this witness is telling of the things he discovered in the substance in question, he is testifying to facts, and these facts must be accepted and treated like all other facts in the case; but if the same witness thereupon expresses an opinion based upon those facts (as, that the particular substance had been part of a piece or batch of similar substance), then he would to that extent be testifying to merely an opinion, and as a technical expert witness

It would seem clear, therefore, that the kind of expert witness to which this paper is limited, may—and generally does—testify in a dual evidential capacity, viz.,—as an ordinary (though skilled) witness to facts, and as a strictly expert witness to opinions. The responsibility attached to his testimony is likewise of a two-fold character, and the proper weight should accordingly be given to each part. If these distinctions were more generally observed, the ends of justice would be greatly advanced, both as to litigants and as to witnesses, for there would be less of an atmosphere of ignorant prejudice, and more of an air of calm reason in our Court-rooms.

In those jurisdictions where it is held that expert testimony can only be received as corroborative of other testimony, the recognition of the foregoing distinction would also be found of very great advantage, in that class of cases where, by reason of death, long lapse of time, or other conditions, it is found difficult or impossible to procure an ordinary witness who can testify concerning the facts, which, if once introduced, could then be corroborated by technically expert testimony.

Bearing in mind then, the conceded proposition that our "expert witness" will be allowed to actually testify (*inter alia*) to facts contained in the writings themselves which have been introduced in evidence, even although such facts may be utterly beyond the knowledge and vision of the Court and jury themselves, let us now pass to the second of our questions, viz., as to the real status of a "mark."

In a general and popular sense, the "marks" to which this inquiry is limited, comprise the ordinary cancellation mark and the cross used by illiterate persons as a substitute for a signature.

When inspected by ordinary, unskilled eyes, all single or double straight pen and ink strokes look alike, unless, of course, the colour of the ink should be different. Hence in a very few instances, the Courts have precipitately jumped to the absurd conclusion that therefore, cancelling strokes and mark signatures were not "writings," but merely "marks," and as such incapable of proof!

And yet the Court is not known which ever ruled out evidence offered tending to prove or disprove the identity of exactly similar strokes, when they happened to have been used as characters representing (a) the figure 1, whether

used singly or in repetition; or (b) the abbreviated symbol for dates including similar longer and shorter strokes, as in 1/11/11; or (3) the symbol frequently used in expressing cents in monetary figures, as $\frac{1}{1}\frac{1}{6}$ or $\frac{1}{1}\frac{5}{6}$; or (d) either the single mark or the cross-mark, when used in ordinary writing, or in the so-called "printed" writing, as part of an attempt to disguise the hand of the writer.

The author has testified in all of the foregoing instances, as well as in cases of single strokes added in alterations, and of "mark" signatures. And why not? Testimony as to comparison of seal impressions was allowed even at common law, and testimony as to comparison of type and stamp impressions—e.g., in printing, typewriting, stamping, engraving, etc.—is freely allowed.

Fortunately, however, most of the Courts have been less precipitate than the few before referred to, and the rule has been generally established that the "marks" which come within the scope of this article may be proven in like manner as "writings"; and that is now the practically invariable rule—at least in all cases where testimony is also offered shewing that the "marks" in the particular case have some established characteristics which would tend to individuate them and distinguish them from similar marks made by other persons or other means.

Therefore the characteristics of a mark may now be put in evidence by a witness sufficiently skilled to ascertain them, and after these facts are in, they can be followed by expert opinions based on those facts; the Court and jury will then have a real foundation of facts upon which to base a decision, and in the consideration of same will be greatly aided by the opinions of persons better qualified than themselves to judge of those facts. Where, before, all was darkness and uncertainty, there will now be (in unprejudiced minds) a great deal of light and much certainty. But, you may ask, does a mere "mark" have any distinguishing characteristics? To this the author answers, unqualifiedly, "yes." After devoting over twenty years to the general examination and testing of questioned documents, including voluminous experiments and studies on this particular point extending over the last thirteen years, he has found an abundance of such characteristics to determine any question of identity concerning such a mark.

Of course, when you are confining your attention to the "mark" alone, there are fewer characteristics visible to the ordinary observer, or by the naked eye; but a skilled person, with his eyes aided by proper instruments, and a trained judgment, can discover more than enough to solve the question in hand.

It is a fortunate coincidence that here, where the ordinary visible characteristics are, on the whole, fewer in number, the difficulties in the way of simulating the marks are relatively much increased; this is because practically all that the imitator can see to copy, is the mere form, and this does not appeal strongly to him, as he is likely to think that any straight line would look enough like any other straight line of about the same width, to pass current for the other one. Practically all the other characteristics of the "mark" are utterly beyond the powers of the imitator to copy, even if he has the skill and means to discover them, because they are only observable when greatly magnified, while his simulated mark must be kept at its natural size.

In a "mark" then such as we are considering (small and insignificant though it may seem). we can now discover a large number of the most significant and distinguishing characteristics, the actual number whereof may vary slightly in different instances according to conditions. Stated generally, it is possible to ascertain not only the form and position habits of the writer, but also all the details of exactly how he held and operated his pen, the action of each individual pen nib, the amount of force used and the manner of applying same, and all the peculiar results of these methods of operating; also a number of physical peculiarities of the "mark" itself we can also ascertain the nervous temperament and action of the writer, and the extent and character of the dynamic action of the forces of the writer's body upon the stroke. By far the greater portion of these characteristics are not in any manner affected by the physical or mental condition—in the ordinary and popular sense—of the writer at the time, or by his surroundings, and continue relatively alike during the greater part of his life; consequently they afford what might appropriately be called a fixed standard for that writer.

From his own long experience and study of the point, the author has also found that while it is true that there may be another person possessing one or more of these

characteristics identical with those of the first writer, yet the identity never extends to any considerable proportion of the entire number of characteristics; *a fortiori,* no two persons either will, or can, agree in all particulars.

Hence we have means at hand to distinguish, and identify or differentiate, the writer of a mere "mark," though the mark may be less than a quarter of an inch in length; and whenever the field of observation is increased through the medium of a larger mark, or more marks, opportunity is afforded to find still other characteristics in what may seem like only a series of arbitrary marks. If now we include curved marks with the straight ones heretofore considered, we add still more characteristics, and at once step out of the field of "marks" into that of written language. which is always made up of straight or curved lines, or combinations of both straight and curved lines.

It necessarily follows that if a person is sufficiently skilled to thus analyze a straight stroke and a curved stroke, and to identify or distinguish the writers thereof, then—whether he has any acquaintance with the particular language, as such, or not—he is fully competent and qualified to pass upon the question of the authorship of any writing in such language. Whether used as part of a writing in hieroglyphics, or Sanscrit, or Arabic, or Russian, or Yiddish, or German, or English, a stroke's a stroke, "for a' that."

WEBSTER A. MELCHER.

RECENT CASES ON THE STATUTE OF FRAUDS.

Two cases reported recently, on sec. 4 of the Statute of Frauds, are of interest and worthy of note.

The English Court of Appeal in *Prested Miners Company Ltd.* v. *Gardner Ltd.* (1911), 2 K. B. 425, affirming the decision of Walton J. (1910), 2 K. B. 776, held that an agreement for the sale of goods of the value of £10 or upwards, and not to be performed within the space of one year from the making thereof, is not taken out of the operation of the 4th section of the Statute of Frauds by reason of there having been an acceptance and actual receipt by the buyer of part of the goods so sold. Cozens-Hardy, M. R., in delivering

the judgment of the Court, said that the decision of the Judge of first instance was clearly right, although there had been no express authority hitherto on the point.

The report of the case in (1910), 2 K. B.., deals only with a question of law, viz., whether the objection taken by the defendants that the provisions of sec. 4 of the Statute of Frauds had not been complied with was good as applied to a contract for the sale of goods under which acceptance and receipt of part of the goods by the defendants had actually taken place. It was argued that sec. 4 of the Statute of Frauds and sec. 17 of that same Act, as amended by Lord Tenterden's Act was mutually exclusive, and that, therefore, a contract for the sale of goods which satisfies the conditions of sec. 4 of the *Sale of Goods Act* (re-enacting sec. 17 of Statute of Frauds as amended by Lord Tenterden's Act), is taken out of the 4th section of the Statute of Frauds. Walton, J., in the course of his judgment comments on the fact that there is no express authority on the point, and counsel in the case apparently were able only to find one decision bearing on it, and this he sought to discount in so far as the portion of the judgment referred to, applicable to the facts of the case being tried, was *obiter;* the authority quoted was *Bracegirdle* v. *Heald* (1818). 1 B. & Al. 722, in which it was held that a contract for a year's service, to commence at a subsequent day fell within the 4th section of the Statute of Frauds, a matter upon which, now at any rate, there can be no question.

The words referred to by counsel as being *obiter,* and which appear to assume that a contract for the sale of goods could be within sec. 4 of the Statute of Frauds, are contained in the judgment of Abbott, J., and are as follows: "The case put in argument, of an agreement for goods to be delivered by one party in 6 months, and to be paid for in 18 months, being after more than a year has elapsed is distinguishable on this ground, that there all that is on one side to be performed. viz., the delivery of the goods, is to be done within a year."

With such meagre authority strengthened by the fact that in "the text books, including those of such authority and standing as Smith's Leading Cases and Leake on Contracts, it appears that it has always been assumed that an agreement for the sale of goods may be within sec. 4 of the Statute of Frauds," Walton, J., so held, and we have thus a judicial

ruling confirmed by the Court of Appeal on a point that has hitherto remained undecided.

The second case referred to at the beginning of this article is that of *McInnes* v. *Thompson,* 32 Australian Law Times 139. Here the provisions of the Instruments Act, 1890, sec. 208 (sec. 4 of the Statute of Frauds), requiring a contract for the sale of land to be signed by the party to be charged, came up for consideration. The question to be determined was whether the signature required by the Act must be the signature, written by his own hand, of the party to be charged. We cannot say with Bray, J. (*Reeve* v. *Jennings* (1910), 2 K. B., at 525), that this is a point which apparently has never in terms been decided during the 200 years which have elapsed since the passing of the statute, for there is much information to be gathered from the wealth of decisions on this point. It has been held that various mechanical means of affixing what served as a signature, *e.g.,* a rubber stamp, or printing the name, are sufficient to satisfy the requirements of the statute. Again, we have the case of the name of the sender of a telegram, being written in by the telegraph clerk. where the sender had himself signed the instructions for the message; here too the signature was held sufficient.

Recognizing the enormous spread of mechanical means of writing, à Beckett, J., in the course of his judgment in the case under consideration expresses the opinion that "a person employing another to work a typewriting machine at his dictation and to type his name to the document would affix a signature sufficient to bind him under the statute." An early case in the Australian Courts bearing on this point is referred to, *Boyle* v. *Basan,* 8 A. L. T. 82. The defendant was the owner of an hotel and had authorized W. H. L., an hotel broker, to effect the sale of the property. W. H. L. sold the hotel to Boyle; a contract note was signed by W. H. L. per J. E. L., his clerk, on behalf of the defendant; subsequently the defendant refused to complete the contract. It was contended that there had been no writing signed by the defendant under the Statute of Frauds, Webb, J., in giving judgment for the plaintiff held that the signature was sufficient. He said, "The statute required that the contract should be signed by the party to be charged. In the case of *Schneider* v. *Norris,* 2 M. & S. 286, it was held that the name of the person sought to be charged, and

which was printed on a billhead and printed by the defendant's orders, was a sufficient signature. . . . If the printer was to be regarded as merely a machine for signing a name, a clerk was also to be considered as authorized to sign a name." The ultimate test appears to be then, slightly paraphrasing the language of à Beckett, J., "Does the writing purport to be that of the defendant, and to be signed by him, and not to be the writing of others writing on his behalf?"

THE LIGHT SIDE OF THE LAW.

THE UNPOPULARITY OF SOLICITORS.

The following observations are intended to be, not a whine, but in the nature of a philosophical inquiry. There is no occasion either for apology, or an appeal for mercy. The economists have taught us the compensatory adjustments of the various trades; otherwise there would be 10,000 applications for the post of gamekeeper and none for that of scavenger. A coal miner is better paid than a cherry picker. The hangman, one suspects, draws a salary for which a stonemason would sigh in vain. So the solicitor, amid the uncomplimentary adjectives which hurtle around him, sometimes finds consolation in a secret shared only with his banker and his accountant.

That solicitors, as such, are unpopular cannot be denied. From Dr. Johnson's classic insult, "He desired not to speak ill of the gentleman, but he believed he was an attorney," down to the unrestrained comments of the last unsuccessful litigant smarting at the cost of a faulty diagnosis of his particular grievance, the public estimate of solicitors is clear, outspoken and uncomplimentary.

Consider, however, for a moment, the position of a solicitor as retailer in penn'orths of our confused and complicated law. He is no more responsible morally for an unsatisfactory article than the village grocer, whose tea and coffee are sometimes subjected to criticism.

English law is a fen of stagnant waters. There are survivals still working mischief, which can be traced back to the

Druids. Consider this palæozoic layer, covered with Danish tradition and odd fragments of Pictish, obfuscated by Saxon, steam-rollered by the short, but heavy, passage of the Roman, overruled by the Norman, bedevilled with the Canon Law, made the sport of five hundred years of conflict between King and people and King and Church, and, lastly, patched and amended and draped and trinketed by every passing phase of popular legislation.

You cannot explain the simplest conveyance of the silliest seaside plot without harking back to Henry VIII. The very bailiff whose muddy boots desecrate the portals of the impecunious, traces his dingy ancestry back to the feudal system.

The happy-go-lucky legislator, with his fine, careless raptures, is responsible for much. It requires the boldness of ignorance to legislate confidently. The sanguine Member of Parliament, hastily scribbling amendments in the lobby, can disturb the sedimentary deposit of ages, and his spicule of law remains to work havoc long after his constituency will have no more of him and he has retired into private life.

It is this dark and fermenting mass which has to be handled by solicitors. Yet when you call and desire that it shall be applied to your own small grievance, pay your 6s. 8d., and have measured out to you your half-pint of legal information and advice, you yelp and curse your solicitor because the mixture disagrees with you.

Consider, too, the Judges, to whom it is the privilege of the solicitor to introduce you and your woes. They are not interested in you, and they approach the question in dispute from a standpoint not always understood. Sentiment is lost upon them; they neither fear wrath nor regard tears. No one knows what they would say or do if it was attempted to tell them what Parliament intended by any particular statute, for it is believed that the experiment has never been tried.

Litera scripta manet. You remember the story of the literal-minded bandsman who disturbed the harmony of the orchestra with a discordant blast. The conductor inspected his score, and pointed out that the bandsman had attached undue significance to a dead fly pressed upon the lines.

"I knew it was a fly," replied the man; "but it was there, and I played it."

His Majesty's Judges may often be conscious of the dead fly on the Statute Book; but if it is there, they conceive it to be their duty to give effect to it.

There is a type of Judge, conscientious and oppressed by authority, whose judgments often betray hesitation and vacillation and a knowledge that there is a Court of Appeal which will put him right. That is bad enough. But there is a worse Judge, who sits bold and confident and attempts to administer a fine, natural justice regardless of precedent. This Judge may give a short-lived satisfaction in the emotional atmosphere of the Court of first instance, but such a success is apt to be dispelled ruinously in the white light and arid heights of the Court of Appeal.

You may perceive in all this a further field where the hapless solicitor may, without fault, fail to produce pleasing results.

It is worth pointing out that, in one important respect, the community has itself added to its own burden, while complaining that it is lawyer-ridden. The law has for centuries, under the Statutes of Distribution, provided what is, in effect, a plain intelligible will suitable to the circumstances and duties of the average man. And it is to be noted that—except where the archaism of dower intrudes—this division is an immediate and final one. Testators and property owners, however, have never resisted the temptation to play the part of special Providence after their decease, and hence the universal practice by which the dead hand controls property for generation after generation. It is the whole breed of trusts and settlements and strict entails which has riveted the country lawyer on to the back of the landed gentry, so that a man dare scarcely let a field or fell a tree without consultations with the family solicitor.

Withal, however, it must be admitted that there are instances in which the hand of the lawyer presses heavily. It is not good for any man that he should have the power of levying his fees upon those whose goodwill or custom it is not important for him to retain.

For instance. You are a shopkeeper, and sell your business. You desire to transfer the lease to the buyer. You write to the landlord for permission, and are referred to a solicitor, who is a stranger to you. You are surprised at

the formalities in connection with the preparation of the necessary license, and dismayed at having to pay two guineas for it. This sum would provide your daily paper for a year, or make you a member of a library or a club, or take you to the seaside for a week-end. Money, however, does not go far in a solicitor's office. And then, when you have got your license, the purchaser complains that he has to pay another guinea to the same solicitor for registering the assignment in the interests of the landlord.

Little things like this infuse into the ordinary man a prejudice against solicitors. When a man once conceives himself to have been stung by a solicitor, it is an inflamed countenance he turns towards them for the rest of his days.

To take another instance. Suppose you have a mortgage on your house. You find that between you and the lender there bobs up the lender's solicitor with disagreeable persistency. Sometimes, one regrets to say, you will find it expedient to adopt the lender's solicitor as your own if you wish for anything like continuity about that mortgage. You call to say you are in a position to pay it off. The solicitor informs you that the lender is entitled to six months' notice to pay off, or else the equivalent in interest. Naturally, you decide to wait for that period, and at the end of it are amazed to find that (with other costs) you must pay 10s. for the interview in question, and another 3s. 6d. for the letter addressed to the lender by his solicitor informing him how sternly his rights were upheld. You engraft that six months' rule upon your mind, and later are struck dumb to find that, while a lender is entitled to that period "to find another security" (ask any intelligent stockholder as to the necessity for that!) the borrower, in virtue of what is called the personal covenant to repay, cannot rely upon as many weeks in which to essay the infinitely more difficult task of finding another fund.

Most of the land in England is under mortgage, they say. It is wonderful that no champion of the public has ever written on "the tyranny of the mortgage." If he ever does, be sure the solicitor will not be spared.

Then there is the dreary debt-collecting side of the solicitor's work. The vast majority of actions at law brought every year are undefended—that is to say, they are actions in respect of debts not disputed, but unpaid for the reason that the defendants have not the means wherewith to settle

them. It stands to reason that the man who cannot pay the amount of his debt feels severely the pinch of the additional payment which falls upon him by reason of these actions. Such costs have to be paid, and they are extracted, sometimes painfully, from the unfortunate debtor, who thereupon bears a grudge against the solicitor instead of aiming his futile protest at the social system in which he has been found a defaulter.

It will be seen, therefore, that the solicitor's lot is not a happy one. He is the scapegoat of the law, on whom is vented the wrath of everyone bruised by its ponderous machinery. Yet his numbers do not decrease. The clerk's son becomes a schoolmaster, the schoolmaster's son becomes a doctor, the doctor's son goes to the Bar, the barrister's son enters the Church, the clergyman's son goes into the Army or the Navy—or to the devil. But the solicitor's son always goes into his father's office.

From which you may draw your own conclusions.

WILES OF THE JERRY-BUILDER.

Please observe these are not my experiences or my sentiments. They are the words of Martin Sapcote, of Dalston; alias Steven Martin, of Harlesden, builder; alias Martineau and Co., of West Ham, builders; alias Prebble and Martin, of Hastings, builders and contractors. Mr. Sapcote, sailing once more under patronymic colours, is now a joiner out of a job. He has recently learned, in a very uncomfortable fashion, that to obtain credit for £20, without disclosing that you are an undischarged bankrupt, is a misdemeanour punishable with imprisonment for a period not exceeding two years. He rejoined his fellow-creatures yesterday, and finds, I think, renewed zest in the pleasures of conversation. I should be sorry to think or to suggest that he is typical of his ancient and honourable trade; but there are enough of him to make it worth while to report his experiences. You must imagine him a stocky little man, red-faced, and with a twinkle in his eye.

All I did was to take notes and pay for the beer.

"To speak candidly," said Mr. Sapcote, "I am not a skilled scientific builder; I have not done contract work—no cathedrals, churches, and such-like. There will be no enduring monuments of my work when I have passed away, for

men to point at and say, 'That's a bit of Sapcote's work.' Not that sort of thing at all. What I understand is the erection of the ordinary suburban dwelling-house, from the £50 villa, down to the 8s. a week, landlord paying rates and taxes. The sort run up to be let or sold. The sort the building societies get fed up with. Structure warranted to give no anxiety for at least five years. In a word, the sort of property the jerry-builders play beggar my neighbour with all round the ring of London.

"I learned the business under old Perrin. I was foreman joiner on a job of his at Acton, when his trouble began. I remember the Saturday. Half-past one, and no sign of the wages. Men were just getting nasty when a lawyer's clerk came up hurriedly and paid them off, old Perrin himself drawing the wages of two brick-layers I had not heard of before, who, he explained to the clerk, had had to go home to their missuses.

"Sunday afternoon, round comes Perrin to my rooms smoking a cigar, and takes tea with the wife and me.

"'You been my foreman, Sapcote, for some years,' says he. 'Now I'm going to put you in the way of starting for yourself, and I'll be your foreman," says he.

"Next week he introduces me to Messrs. Smirk, Wriggle and Twist, of Bedford Row. They sent me on to the surveyor, references were passed—here Perrin proved a surprising friend in need—and the contract signed. Within three weeks we had the footings in on my job, and the merchants' travellers were clustering round asking for Mr. Sapcote. Sometimes they would see him, but more often they saw his foreman—old Perrin, in a flannel shirt, and his side whiskers gone—a quite altered character you believe me.

"What about plant? Well, you don't really want much. Some ladders and planks, perhaps. Perrin's sister-in-law had a mortar mill—a curious bit of property for a lady, it seemed to me at the time, though I understood later how it was. Scaffolding? Well, scaffolding in the speculating building trade is like umbrellas in the cloakroom of a gentlemen's club—a sort of property by itself, here to-day and gone to-morrow. What with borrowing and hiring, and executions, and auctions, and the freeholder claiming everything, to say nothing of what's done in the night on the job when there's no watchman, there's no safe reckoning on scaffolding. What it comes to is that the builder who knows his

trade generally has what scaffolding is necessary, without much trouble or expense.

"About the building agreements? Oh, I never troubled to read them. Perrin used to say they are all alike. Ninety-nine years' lease, six months' peppercorn, ground-rent £5—thirty shillings improve—advances up to 70 per cent., surveyor 2 per cent. on the certificates, solicitors 3 per cent. for finance; leases, plans, abstracts of title, and conveyances on sale, all extra. Right to the freeholder in almost any event to step in and collar everything. Think the agreement somewhat exacting? No; I don't.

"Of course, at the public examination you always attribute it to 'excessive law charges.' but really the financier and the builder understand each other very well. The builder starts with nothing to lose. What he wants is a run for the money and a good weekly wage without being a journeyman. What the financier wants is to get his land covered without having to give the orders for the goods. *Quicquid plantatur solo, solo cedit.* I learned that bit of Latin in a County Court where a freeholder was sued for doors and window-frames, and I was called as a witness for the defence to produce invoices and shew to whom credit was given. Yes, the builder may call the financier and his solicitors cunning and extortionate, and they may call him pigheaded and incompetent. That's for the benefit of the Court, and to appease creditors. Privately a better understanding usually prevails, and it's more than one friendly fiver I've had on the quiet during the investigation of affairs, and while the Official Receiver or the trustee has been nosing about.

"Builders' merchants trustful? Very! Bricks and timber, slates and cement—they almost throw them at you. Ironmongery and earthenware come easy enough. Lead and glass sometimes—but not often—are a bit difficult to get. At least, that is my experience.

"Mind you, it's a trade that calls for a bit of skill. There's the district surveyor, for instance. It's his duty to be up to all the tricks of the builder. But then it's the builder's pride to be up to the district surveyor, so the honours are about easy. I have known grates and baths and sinks moved from house to house in a marvellous way. I have known drains nicely laid, ready for inspection, passed, and closed up, only to be opened again for the removal of traps and gullies serviceable for a future occasion. I have

known mortar for show, and mortar—concealed by a bit of planking—for use. Wonderful what you can make mortar of, if put to it. And when the pointing's done, no one is the wiser till the stuff dries, and the dust blows away and the bricks fall loose—about the time the mortgagee is trying to sell the house.

"What I do pride myself on is an ability to dispose of my houses. Fine Sunday afternoons are the time. You put on a bowler hat, black coat, flower in your button-hole, cigar in your mouth, and stroll down the road, leaving the doors of the houses open. Presently the young couples come peering about. City clerks mostly—innocent-like, but full of that confidence a young fellow feels when there's a girl with him hanging on to every word he lets fall. You accost them civilly as they come out. No, the house is not to be let, but can be bought on very easy terms. Will they turn back and look over it again with you? Not very critical, you find them. Tell the young woman she can choose all the wallpapers, and she'll not bother about 4½-inch walls and the wastefulness of the kitchen range. And the young chap measuring the bit of garden, crazy to try his hand at lettuces and spring onions, with a vision of her handing him the new watering-can or at the door calling him in to his supper.

"So, you see, there's no real difficulty about getting a willing purchaser, and then it's only a question of easing him over the finance. Ten pounds is all he's got, after allowing for furniture and the cost of the wedding. Nice sum for a bicycle, but not much towards the cost of a house, you think? Wait a bit. His girl not liking business on a Sunday, he arranges to call on Monday after office hours.

"So he calls on Monday with the ten sovereigns. £200 is what Messrs. Smirk and Co. want before they grant the lease. I whisper a secret to him, and presently he goes off with a contract in his pocket for the purchase of the house at the price of £235, and a receipt for a deposit of £35. The Building Society will lend him £200 on mortgage of the house, so long as they are satisfied there is a 'margin.' So we fix up that margin over the deposit—a friendly understanding between him and me.

"Not another drop, thank you sir. I'm afraid I've been talking very freely. My plans for the future? Well, being debarred at present from a job of my own, I have

thought of a plumber that worked for me down West Ham way. He has just married a housemaid with £100 in the savings bank. I think of getting him started under a building agreement at Dulwich—me helping him as foreman."

GEO. A. MACDONALD.

SUPREME COURT OF CANADA.

THE KING v. JONES.

Ex. C.] [MAY 8TH, 1911.

Expropriation of Land—Compensation — Transcontinental Railway Commission — Jurisdiction — Railway Act — Exchequer Court Act sec. 2 (d)—3 Edw. VII. c. 71.

The Transcontinental Railway Act, 3 Edw. VII. ch. 71, does not expressly empower the Commissioners to deal with compensation for land taken for the railway, and sec. 15 giving them "the rights, powers, remedies and immunities conferred upon a company under the Railway Act" does not confer such power.

The Transcontinental Railway is a public work within the meaning of sec. 2, sub-sec. (d) of the Exchequer Court Act and proceedings respecting compensation for land taken for the railway may be taken by or against the Crown in the Exchequer Court. Judgment of the Exchequer Court (13 Ex. C. R. 171), reversed.

Appeal allowed without costs.

E. L. Newcombe, for appellant.

[JUNE 1ST, 1911.

CROCKETT v. TOWN OF CAMPBELLTON.

Municipal Corporation—Water Services—Statutory Authority—Construction of Statute—Water for Domestic, Fire and Other Purposes — Motive Power — Discretion of Council.

The charter of a town (50 Vict. ch. 58, sec. 6 (N.B.)), provides that "the town council of town of Campbellton

are hereby authorised and empowered to provide for the said town a good and sufficient supply of water for domestic, fire and other purposes."

Quaere per DAVIES, C.J., and ANGLIN, J., could the town be compelled to furnish water power for a motor in an industrial establishment?

Held, per IDINGTON, J., FITZPATRICK, C J. and DUFF, J. contra, that the charter does not empower it to do so.

The town council, by by-law, fixed the rates to be paid for water including "printing presses one service, 1¼ pipe or less, per year $30." C., proprietor of a newspaper and printing establishment, connected his premises with the water mains by a two-inch pipe and received water for a year for his motor, paying said rate therefor. He then continued the use of the water for some months when the council passed a resolution that newspaper proprietors should be notified that the supply would be cut off at a certain date, which was done. C. brought an action for damages to his business.

Held, per IDINGTON, J., the council had no authority to make the contract with C.; there was no authority in the absence of a special contract with the town, to place a two-inch service pipe for receipt of water, and if the municipality had power to enter into this agreement it was under no duty to exercise it

Per FITZPATRICK, C.J. and DAVIES, DUFF and ANGLIN, JJ. If any contract existed it was one under which C. was entitled to a supply of water for his motor so long as the town council should, in its discretion, deem it advisable to continue it.

Per DAVIES, J., and ANGLIN, J., there was no evidence to warrant the jury's finding that the council was guilty of negligence, and exercised its discretion malâ fide.

Per FITZPATRICK, C.J., and DUFF, J., the circumstances disclosed were such as to warrant a finding of unfair discrimination against C.

Judgment appealed against (39 N. B. Rep. 573), affirmed.

Appeal dismissed with costs.

O. S. Crockett, for appellant.

Teed, K.C., for respondent.

The
Canadian Law Times.

VOL. XXXI. SEPTEMBER, 1911. No. 9.

THE ORIGIN OF THE PETTY JURY.*

After all the study and investigation given to the legal and constitutional history of England in the thirteenth and fourteenth centuries, the origin of the petty jury has not yet been made clear. Much has been said to shew the development of the petty jury after it was started, but its origin and early development need further illustration and interpretation from the sources.

In its original form, a jury is a body of impartial witnesses, summoned by royal writ or authority, sworn before officers of the King, to declare all the facts in the case, or to indict persons guilty of crime. Practically and in brief, a body for royal information. It came into use in England through William the Conqueror, for purposes where accurate knowledge was required, as in getting the material for Domesday and ascertaining the laws of King Edward; it was also used by Henry II., in the Assize of Arms and the Saladin Tithe, and took the place of the duel in determining title and possession in civil cases tried in the King's Court. The first notice of its application to criminal cases is found in the sixth chapter of the Constitutions of Clarendon, 1164 A.D., where, in the case of a layman so rich and powerful that no individual dares to appear against him, "the sheriff shall cause twelve legal men of the neighbourhood, or of the vill, to take an oath in the presence of the bishop that they will declare the truth about it." It is elaborated, regulated, and more fully described in the first section of the Assize of Clarendon, 1166 A.D., where twelve legal men of the hundred and four legal men of each vill, before the sheriff

* From *The Law Quarterly Review.*

and the justices itinerant, are to tell the truth, upon oath, whether there are in their respective hundreds or vills any accused or notorious criminals or harbourers of them. This was the institution of the presentment or grand jury, to supplement individual accusation in bringing criminals to justice. Once accused in this way the defendant was tried by the ordeal, as compurgation in such cases was ruled out by this assize, and the duel could not apply. The use of a jury to give the final decision of guilt or innocence, and therefore called the petty or trial jury, was a matter of gradual development, but its use after 1219, when the ordeal was abolished, became an absolute necessity, though its final form was not reached till long after that date.

Mr. Maitland, in his introduction to the Pleas of Gloucester of 1221, published in 1884, said: "The petty jury is still in the future and perhaps we should look for its germ in the *quattuor villatae*, to which recourse is had when the *juratores* say that a man is guilty."[1] In the monumental work on English Law, published twelve years later, he says, however: "At present we do not think that the four townships can be said to become the petty jury of later days."[2] Sir C. Chadwyck-Healey, in his introduction to the Somerset Rolls, says: "In the early years of Henry III., the justices seem to have been trying experiments. Sometimes a man is convicted by the voice of jurors selected from one hundred, sometimes from several hundreds of the county. With them may be associated the representatives of varying numbers of townships. There seems to be no rule. Not many years pass and we find the practice to all appearance settled. The jurors of the hundred and of the four townships decide the prisoner's fate."[3] But it is not all settled even "to all appearance." The "four townships" are only an element in the solution, too much attention to which seems to have led many investigators away from the right track.

The late Dr. Gross, in his scholarly introduction to the Coroners' Rolls, published by the Selden Society, said: "There seems little doubt that in the thirteenth century the same jury of the hundred which presented a person, also tried him."[4] This is true generally, but there are many

[1] Pleas of Glouc., Introd. p. xliii.
[2] Pollock and Maitland, History of English Law, ii. p. 646, 2nd edition.
[3] Somerset Pleas, Introd. p. xvii.
[4] Gross, Coroners' Rolls, Introd. pp. xxxii. and l.

variations which are of great importance, as in these variations we may trace the line of the evolution of the petty jury into its final form.

It is undoubtedly true that the trial or petty jury emerged out of the presentment jury, which was the only jury at first. As a matter of fact "the four vills" formed a part of the presentment jury in cases before the coroner, as well as by their presence in the County Court. The remark of Mr. Maitland that "recourse is had to 'the four vills'" as if there were two separate references of the case, the first to the twelve jurors of the hundred, and a second one to the "four vills," seems to point only to an earlier method, as we may gather from some cases in the reigns of Richard and of John, when the jury was used in connection with the ordeal, and indicates, I believe, the introduction and first stage of the evolution of the trial jury, namely, requiring their verdict not to decide guilt or innocence, but to decide what shall be the form of the ordeal or other mode of trial. For example: "The jurors being asked, say that they suspect him of it. The whole country likewise suspects him. Let him purge himself by water."[5] "The jurors suspect him and the four neighbouring vills being sworn suspect him of it. It is considered that he purge himself by water."[6] In this case it is clearly seen that "the four vills" are brought in and sworn and their verdict taken as an additional element confirming that of the presentment jurors. In another case the appeal is of killing. "The knights of the hundred of Penwith say that they suspect him, the knights of Kerries say the same, the knights of Penwith (*sic*) say the same, the knights of Pyler say the same; judgment: let him purge himself by water."[7] Several other cases occur in Staffordshire. "Henry of R. is arrested and suspected by the jurors and the four neighbouring vills, of robbery, etc. . . Let him purge himself by water." Another case: "The jurors and the whole neighbourhood suspect him of that killing. And it is considered that he shall purge himself by the judgment of iron, because he elects to carry the iron."[8] These cases present clearly the first use of a trial or petty jury in criminal cases

[5] Sel. Pleas of Crown, i. p. 1, No. 1 (1201 A.D.)
[6] Sel. Pleas of Crown, i. p. 1, No. 5 (1201 A.D.); see also Nos. 6, 8, 9, 10, 12, 57 (1202 A.D.), 68 (1203 A.D.)
[7] Sel. Pleas of Crown, i. p. 7, No 19.
[8] Salt Soc., iii. pp. 95, 96 (1203 A.D.)

as a subsidiary or intervening link, taking the indictment of the presentment jury and deciding whether the appealed shall go to the ordeal or not. It was usually the same body, for evidently those who had presented the appeal would know best whether he ought to be sent to the ordeal or not.

In cases when the ordeal is not employed, especially after its prohibition in 1219, the verdict of the jury appears as the final settlement of the case. This may be called the second stage of the development, and indicates one of the ways in which the jury, that is the presentment jury with or without the addition of "the four townships," came to be called upon to render the final judgment.[9] In two cases a jury was called to decide if the appeal was made for spite. The practical result would be a verdict of guilty or not guilty, shewing, as Mr. Maitland points out, another way in which the jury came into use to render a final judgment.[10]

In most of these earlier cases, in the reigns of John and of Henry III., where a special trial by jury alone is secured, a money payment is made, though this does not appear to have been enforced, nor was it always made. It does shew, however, that sometimes there was a special desire for a trial by jury and a special effort made on the part of the defendant to secure it.

There are many instances of trial by jury in criminal cases to be found in the Assize Rolls, published and unpublished, from the time of Richard I. to the close of the reign of Edward I., all of which I have examined. By far the larger number of these cases down to the reign of Edward I., shew that the jury of the hundred, the presentment jury, does give the verdict of guilty or not guilty. In these cases the statement frequently is made that "The defendant has put himself on the country for good or ill," though this is not always stated. The verdicts are introduced usually with the phrase, "And the twelve jurors say" or "And the jurors say."[11]

[9] Sel. Pleas of Crown, i. Nos. 59 (1202) A.D.), 72, 74 (1203 A.D.), 78, 79, 94, 134, 143, 144, 161, 162, 163 (1221 A.D.)

[10] Sel. Pleas of Crown, i. Nos. 81, 86.

[11] A. R. 818 Suffolk, 24 Henry III., m. 48; A. R. 201 Dorset, 28 Henry III., m. 2; A. R. 233 Essex, 38-9 Henry III., m. 41, m. 43, m. 43 d, m. 57. In the first case of this group in Essex cases, the verdict is guilty, given by the jurors and the four neighbouring vills; in the second, not guilty; in the third and fourth cases the appeal is null, "but for observing the peace of the King, the truth must be

In the Somerset Pleas as published for a part of Henry III's. reign, we find twenty cases in which the verdict is given by the presentment jury of the hundred, while there are about thirty cases in which the verdict is given by the twelve jurors of the presentment jury and by the four neighbouring vills. There are a few cases where several hundreds and vills are combined to form a petty or trial jury. There are cases in the records in which the jury in their judgment give a different verdict from that given in their presentment. That it is the same jury, in some cases at least, is shewn by the fact that in one case they are fined for this: "and because the eighteen jurors before in their verdict indicted said William and by immediately acquitting him said the contrary, so to judgment with them."[12] This is an unusual case, though there are other cases where the jurors present the appeal and then say on oath that the appealed is not guilty. An earlier case, 5 Henry III., published in Mr. Maitland's collection, is as follows: "The defendants offer the King fifteen marks to have a verdict of the jurors thereon, the money is received, and the jurors say that none of them is guilty. And so they are quit of it. And it must be discussed about the jurors who yesterday said that they suspected them."[13]

A striking case of change of verdict from presentment is found in the Somerset Roll for 1242-43: "Roger was outlawed for wounds inflicted on Adam. The jurors testify that Roger inflicted the wounds by order of John Cole, and that he died thereof. Therefore let John be arrested. John Cole taken for the death of said Adam, by his order it is said, comes and denies the whole, etc., and puts himself upon the country. The jurors testify that he is not guilty either of consent or of order. Therefore he is quit."[14] It is evident that the jurors in this case have received further

inquired by the country," and the jurors in the third case say not guilty, but in the fourth they say guilty, and the appealed are fined for breach of King's peace.

A. R. 235 Essex, 36 Henry III., m. 9, m. 6 d. In the first case appeal null, but, &c., jury say guilty, so appealed is in custody; in the second, appeal null, but, &c., jury say not guilty, and appellor put in gaol for false appeal. A. R. 238 Essex, 56 Henry III, m. 38. Two of the defendants put themselves on the country and give a half mark for a good inquest and are acquitted.

[12] A. R. 11 Bedford, 15 Edward I., m. 36.

[13] A. R. 1021 Worcester, 5 Henry III., Sel. Pleas of Crown, p. 83, No. 130.

[14] A. R. 756 Somerset, 27 Henry III., m. 18; Somerset Pleas, p. 264.

information or are convinced by the defence made by John Cole. These cases, and others similar which might be cited, shew that the use of the presentment jury as a petty jury is not as sure to bring conviction as might be supposed, though it did seem as if the defendant were putting himself for trial upon the oath of those who had already sworn to his guilt. Yet this is not an accurate statement of what the presentment jurors have done. They have not sworn that the defendant is guilty, nor even that they suspect him, but that he is suspected or has been charged. What they have really done is to present or report the state of the case as it stands in the vill, or in the Court of the hundred, tourn or county, that is, what has appeared judicially in the conduct of the case up to the time of the present eyre of the justices, irrespective of what they themselves think, or know, or have since learned, of the actual guilt or innocence of the accused.[15]

Three cases have been found in which one of the jurors differs from the verdict of his fellow jurors. In one case he is put in custody because "he alone contradicted the verdict of his associates without reasonable cause."[16] In another case one juror is adjudged to be fined for contradicting the declaration of the other eleven and the county, that two men had been delivered by the county.[17] In the third case it is stated merely that the "jurors and 'the four vills.' except William de la Ford, who is one of the jurors, say upon their oath that he is not guilty."[18]

We have thus traced the second step in the evolution of the petty jury, that is, the use of the same hundred jury of presentment, sometimes with, and sometimes without "the four neighbouring vills."

In earlier cases the jury was considered more or less of a royal favour and at first had not been used without the consent, or even request, of the accused. "Somehow or other," says Mr. Thayer, "it eventually became the received opinion that one accused of crime would not be tried by the

[15] See P. and M., Eng. Law, ii. p. 648, 2nd edition; A. R. 915 Sussex, 7 Edw. I., m. 13 d; cf. Palgrave, Commonwealth, p. clxxxviii.
[16] A. R. 409 Lanc., 20 Edward I., m. 37.
[17] A. R. 272 Glouc., 5 Henry III.; Pleas of Glouc., No. 238.
[18] A. R. 756, 27 Henry III., m. 21 d; Somerset Pleas, p. 294, No. 1082. Possibly in this latter case he is a relative. In the other cases it may be that bribery or undue influence is suspected; at any rate one juror is held responsible for not agreeing with the rest of the jury.

country unless he should plead and put himself on that mode of trial." But there is a great deal of uncertainty and variety of custom, as may be seen by the writ of 1219 A.D., sent by Henry III. to the justices itinerant, at the very time when the ordeal was prohibited and it was necessary to have recourse to trial by jury alone. It reads as follows:—

"The King to his beloved and faithful . . . Justices Itinerant . . . greeting: Because it was in doubt and not definitely settled before the beginning of your eyre, with what trial those are to be judged who are accused of robbery, murder, arson, and similar crimes, since the trial by fire and water (the ordeal) has been prohibited by the Roman Church, it has been provided by our council that, at present, in this eyre of yours, it shall be done thus with those accused of excesses of this kind; To wit, that those who are accused of the aforesaid greater crimes, and of whom suspicion is held that they are guilty of that whereof they are accused, of whom also, in case they were permitted to abjure the realm, still there would be suspicion that afterwards they would do evil, they shall be kept in our prison and safeguarded, yet so that they do not incur danger of life or limb on our account. But those who are accused of medium crimes, and to whom would be assigned the ordeal by fire or water, if it had not been prohibited, and of whom, if they should abjure the realm, there would be no suspicion of their doing evil afterwards, they may abjure our realm. But those who are accused of lesser crimes, and of whom there would be no suspicion of evil, let them find safe and sure pledges of fidelity and of keeping our peace, and then they may be released in our land. . . . We have left to your discretion the observance of this aforesaid order . . . according to your own discretion and conscience."[19]

As the petty jury was at first constituted, in whole or in part, of the presentment jury, not every accused person would desire or willingly submit to it. For the jurors were witnesses chosen because they were witnesses, that they might give an intelligent verdict. In most cases they were prejudiced witnesses. A man conscious of guilt might well feel that he had a better chance of acquittal by the ordeal, or even by the duel. Mr. Maitland says significantly: "Suc-

[19] Rymer, Foedera, i. p. 228, Jan. 26, 1219 A.D.

cess at the ordeal seems to have been far commoner than failure. Indeed only one single case of failure has been found."[20] But after Henry II.'s Assize of Clarendon, in 1166, with the establishment of appeal by the presentment jury *i.e.*, indictment by the public voice, the duel could not apply, compurgation had been ruled out, and, when the ordeal was abolished in 1219 A.D., there was nothing left but the petty jury as a mode of trial in criminal cases.

Emlyn, in his note to Hale's Pleas of the Crown, is able to cite only two cases in which the trial goes on, just as if the accused had put himself on the country.[21] Mr. Maitland's researches among the rolls lead him to remark that "no other cases to the same effect have as yet been found." In a study of the rolls in the record office, I found only one other case. A woman taken for theft "would not of her own free will put herself on the country, therefore let the verdict of the country be taken."[22] In all other cases special action is taken. Mr. Maitland, in his edition of the Gloucester Assize Roll for 1221, cites eight cases of refusal (Nos. 111, 161, 213, 229, 316, 330, 414, and 435). In the first case, a woman, jurors of two hundreds say she is guilty. Judgment postponed. In four cases the accused, whose guilt is declared by juries of various combinations of hundreds and townships, are put in gaol or in custody. In one case the accused is hanged because he broke out of prison. In one case the twelve jurors know him to be guilty and tell why. Three townships say the same, he is allowed to abjure the realm on payment of forty shillings. In the eighth case, the coroners, twelve jurors and "four neighbouring townships" say, unanimously, that he is guilty. He is allowed to make fine for sixty shillings, to be under pledge to stand to right if any one wishes to plead against him. A similar case occurred in Suffolk. The defendant was unwilling to put himself on the country, and was ordered to find pledges of standing to right, but afterwards he came before the Justices "because he could not find pledges to stand to right, and so, of his own free will he put himself on the country for good or ill, and the jurors testify that they suspect him of many robberies. So, etc. (*i.e.*, let him be hanged).[23]

[20] Sel. Pleas of Crown, i. Introd. pp. xxiv and 75, case 116, note 3.
[21] Hale, Pleas of the Crown, ed. Emlyn, vol. ii, p. 322, note N.
[22] A. R. 230 Essex, 19 Henry III. m. 10.
[23] A. R. 818 Suffolk, 24 Henry III. m. 49 d.

Sir C. Chadwyck-Healey, however, editing the Somerset Rolls for the reign of Henry III., says that he does not find, "any case in which a defendant refused to put himself upon the country."[24]

Yet the number of refusals increased until it was necessary to take more definite action. The Statute of Westminster I, 1275 A.D.,[25] enacted that "notorious felons, who would not put themselves on the country, shall be put in strong and hard imprisonment (*prison forte et dure*)." This was later increased to *peine forte et dure,* and remained in force until its abolition in 1772.[26]

It was evident also, that while the presentment jury was sufficiently representative to present an indictment, it might not be representative enough to give fairly and adequately the voice of the country in regard to the real guilt or innocence of the accused, for the essential feature of the whole system, then as now, is that it is as a representative body that the jury is called upon for a verdict. It represents, that is, the common voice, or the common sense of the community, and that is why having a jury was called "putting oneself on the country." In order, therefore, to widen the sphere of representation, and to make it more attractive, a further development took place, that is, the enlargement of the jury, not merely by the addition of "the four vills," which seemed already practically a part of the presentment jury, but by other additions.

There are many reasons why the presentment jury of the hundred might not have been found adequate as a trial jury acting alone. The inadequacy may have been due: (1) to a lack of sufficient, satisfactory or authoritative information on the part of the original jury of presentment; (2) to some special importance connected with the case; (3) to extra interest or influence, as when a money payment was made; (4) to an effort to avoid prejudice; (5) to a special need or desire to render justice surer, more certain or more definite for special reasons; (6) to special difficulties or peculiarities in the case; or (7) to get a more representative body. After the earlier period, to which reference has been made already, these additions seem to be regarded as

[24] Somerset Pleas, p. 136.
[25] Statutes of the Realm, i. p. 28.
[26] Thayer, Trial by Jury, pp. 69-77; Holdsworth, History of Eng. Law, i, pp. 153-5.

forming with the presentment jury a single body. Mr. Maitland says: "If the hundred jury finds him guilty, then the four townships are sworn and answer the same question. If they agree with the hundredors, sentence is passed. By the end of Henry III.'s reign, it is common that the question of guilt or innocence should be submitted to the presenting jury, to the jury of another hundred and to the four townships. They are put before us as forming a single body which delivers a unanimous verdict."[27] I find no evidence that ordinarily a second oath was administered to any who were added to the presentment jury in order to complete a trial jury when necessary. These additions were all taken from jurors who were present, and by the very meaning of their name "the sworn ones" had already taken the oath.[28] A close study of the assize rolls, published and unpublished, shews that the development of the trial jury is not nearly as simple or as regular as this statement by Mr. Maitland would seem to indicate. However, revising his conjecture expressed in his introduction to the Pleas of Gloucester, Mr. Maitland says: "At present we do not think that 'the four townships' can be said to become the petty jury of later days. The practice of swearing-in these villagers seems to be abandoned as the accused acquired the right to a second jury of free and lawful men."[29]

As a matter of fact the addition of "the four townships" was only one of the many different ways of enlarging the jury, although it was a very natural addition. Neighbourhood knowledge and information were of great importance, and had a special value in early times. "The four vills" were prominent on the coroner's jury, on the presentment jury, in the hue and cry, and in the performance of many other communal functions.[30] Their essential character, indeed, was that of representatives as much as that of witnesses, and it is in this effort to get the representative voice of the community that we find the key to the real origin of the petty jury. It was in their representative character that jurors were employed on the Domesday Survey and for other purposes as an inquest jury. It was their character as representatives that gave them their worth and signifi-

[27] P. and M., Hist. Eng. Law, ii. pp. 647-8 (2nd edition).
[28] Bracton, Leges, f. 116, 143, 143 b.
[29] P. and M., Hist. of Eng. Law, ii. p. 649, n. 4 (2nd edition).
[30] Gross, Coroners' Rolls, Introd. pp. xxx, xxxii, xxxvii, xl.

cance as the presentment jury. This is the one characteristic that binds all forms of the jury into a common unity and shews the same underlying principle in each. It is this characteristic that was made effective in the organization and development of Parliament. Even when the element of witness-bearing was dropped entirely, this characteristic of representation still remained.

In very many cases, therefore, the four neighbouring boroughs or vills (probably the four men from each vill)[31] or the four neighbouring tens are added to the jury of the hundreds.[32]

Sometimes the verdict of two or more hundreds is taken.[33]

[31] Assize of Clarendon, § 1.

[32] In Gloucester, 5 Henry III, Pleas of Glouc., nos. 101 (4 or 5 vills), 213 (3 vills), 228 (4 vills), 326 and 330 (3 vills); A. R. 863 Surrey, 19 Henry III, m. 4, m. 4 d; A. R. 4 Bedford, 31 Henry III, m. 27, m. 41; A. R. 233 Essex, 38-39 Henry III, m. 41, m. 43; A. R. 954 Warwick, 46 Henry III. m. 56 d; A. R. 48 Berk., 12 Edward I, m. 25; A. R. 247 Essex, 13 Edward I, m. 38 d; A. R. 117 Cornwall, 30 Edward I, m. 51. Jurors of that hundred with the four neighbouring tens.

[33] Gloucester, 5 Henry III, Pleas of Glouc., no. 111 (2 hundreds); no. 52, defendant gives 2 marks to have an inquest, jurors of the vill (presentment) and of two hundreds say not guilty (cf. no. 316); no. 436 (2 hundreds); A. R. 863 Surrey, 10 Henry III, m. 4 (2 hundreds), with the statement: 'And let there be a fuller inquest by the neighbouring hundreds because Alice (the appellor) does not speak from seeing, nor shew any reasonable cause why he (the defendant) must have killed him, nor did she sue in the county. So she has no appeal. And two hundreds come and say that they do not suspect him but that Henry died by accident.' This is a very suggestive case, the addition to the original jury of presentment being due to uncertainties of the case, the peculiar nature of the appeal and the difficulties in the way of securing evidence. A. R. 360 Kent, 25 Henry III, m. 2 (2 hundreds); A. R. 568 Norf., 41 Henry III. m. 18 d (ten shillings paid for having a second hundred jury added to the first); A. R. 82 Camb., 45 Henry III, m. 23 (three hundreds and the vills of the said hundreds, making a body of at least eighty-four jurors). See also m. 28 d (2 hundreds), m. 33 d (three hundreds and four vills); A. R. 86 Camb., 14 Edward I, m. 43 d (puts himself on a jury of three hundreds); A. R. 233 Essex, 38-39 Henry III, m. 55 (in this case one hundred shillings are given for a good inquest; the twelve jurors of that hundred and of another hundred with eight men and 'the four vills' give the verdict); A. R. 247 Essex, 13 Edward I, m. 37 d (knights elected for this with the jurors of two hundreds); A. R. 912 Sussex, 47 Henry III, m. 36 (two hundreds and four vills), m. 43 d (two hundreds); A. R. 952 Warwick, 31 Henry III, m. 40 (two hundreds and the twenty-four jurors of the vill of Warwick; in the county some vills have six and larger ones have twelve or twenty-four jurors); A. R. 755 Somerset, 9-10 Henry III, m. 2 (three hundreds and five vills); A. R. 235 Essex, 39 Henry III, m. 14 (jurors of four hundreds and the four neighbouring vills); A. R. 700 Oxford, 25 Henry III, m. 3 (twenty marks for a jury of the four neighbouring hundreds; the four neighbouring vills are added and the verdict is not guilty); Somerset Pleas, no. 124 (one hundred, and five vills), nos. 114 and 171 (two hundreds and the vills), no. 206 (three hundreds).

We come now to the fourth and final step in the evolution, which leaves us with the special petty jury of twelve. Without taking the whole of the presentment jury, or the whole of any of the official bodies of jurors present, a special trial jury is formed by selecting one or more jurors from each of several of the presentment juries of the hundreds, until the number twelve is reached. Various, more or less fanciful, reasons for the number twelve have been given, but they were all brought forward after the number was fixed. Reference has been made already to the necessity of reducing the number of jurors, and the number twelve was fixed upon, probably because that was the number of the presentment jury from the hundred. Therefore, just as the presentment jury represented the voice of the hundred in making the accusation, so the jury of "the country." with the same number, represented the whole county in deciding whether the accused was guilty or not. This jury acts by itself, by way of representing the different juries from which its members are selected, thus forming a more representative jury of the whole county, without increasing the number.

This final step may be illustrated by some interesting cases in a Roll of Gaol Delivery, 21 Edward I. (1293 A.D.), taken from the rolls of Staffordshire, and published by the Salt Society.[86]

(1) "The appealed put himself on the country and the twelve jurors say guilty." These twelve jurors are named, and we find three of the presentment jurors of Cuthelston hundred, one being the first elector; two of Pyrhull hundred, one being the first elector; two of Seisdon hundred; one of Offelowe hundred, being the first elector. The other four cannot be identified with any hundred jury, as the full list of all the presentment juries is not given in the printed records from which the citations are made.

(2) A similar case, giving the twelve jurors by name. Two of them are the two electors of the presentment jury of

(Martin Pateshull) for Gaol Delivery, see Sel. Pleas of Crown, p. 119, n. 1); A. R. 181 Devon, 9 Edward I, m. 15 (the jury of the hundred with knights elected for this); A. R. 247 Essex, 13 Edward I, m. 36 d (the twelve with the knights elected for this); A. R. 573 Norfolk, 14 Edward I, m. 64 (the twelve hundred jurors, knights and other jurors elected for this).

[86] Salt Society, vol. vi, pt. i, pp. 279-281; from m. 33 and m. 33 d.

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There is one case which seems to shew this procedure in one of its forms of transition. "Adam and William were arrested and the jurors of that hundred with the jurors of Brampton say that William is not guilty and that Adam is, so, etc. Afterwards it was testified by the knights elected for this, that Philip, and not Adam, killed the man."[37] Here the presentment jury, with the jury of another hundred, has given the verdict, but another jury of knights specially chosen for this case reverses the verdict.

Among the extracts from the Coram Rege and De Banco Rolls for 11 Edward I., may be found additional evidence confirmatory of this order of procedure. In one case (also interesting as evidence of procedure), an appeal of robbery and breach of the peace is made. The robbers fled. The plaintiff followed them and raised the hue and cry after them from vill to vill up to the fourth vill, and had prosecuted them by means of the bailiffs and coroners (hundred and county officers), up to the Curia Regis, until they were attached. And this, etc., as man against man (*i.e.*, he offered them duel). The defendants appeared and denied all, and took exception to the writ in two points. First, because in the part relating to hue and cry no mention is made of an appeal in the County Court. Second, William de Mere (the lord of the manor), was alive and could prosecute them himself. They said that if the appeal was not quashed on these grounds they put themselves on the country. The sheriff is therefore ordered to summon a jury.[38]

The cases cited in this paper seem to shew quite conclusively the way in which the trial jury emerges out of the presentment jury or juries, and, all taken together, indicate very clearly the four definite steps in the evolution. These four steps are, therefore, as follows:—

First. The presentment jury of the hundred (or borough), with or without additions (of the four townships or others), gives a decision regarding the form of trial (ordeal, etc.), or whether the appeal is made *de atia* or on some other preliminary or concurrent aspect of the case, or to determine some matter of exception to the appeal.

Second. The presentment jury is asked for its verdict as a trial jury.

[37] A. R. 181 Devon, 9 Edward I, m. 16.
[38] Salt Society, vol. vi, pt. i, p. 127; Coram Rege, 11 Edward I, m. 1 d.

Third. The trial jury is made up of the presentment jury, with the addition of others, it may be of the four townships, of one or more hundreds, other townships, certain officials as coroners, knights of the county, etc., or of special jurors elected for the case in hand; any or many of them.

Fourth. A special jury, usually of twelve, selected from the juries at the Court and representative of them, is elected for each case.

The presentment jury still formed an element in the trial jury, and it was long before that element was eliminated. In this part of the process, however, the right to challenge held an important place. Bracton says, "A man cannot choose what *patria* (jury) he will put himself upon, when he puts himself upon the country."[39] But later, with the change in the composition of the jury, this prohibition was qualified. The right of challenge was allowed, probably in order to remove prejudice and induce defendants voluntarily to put themselves on the country. Britton says a challenge is allowed in case a life is at stake.[40]

In Year Book 30 and 31 Edw. I., p. 531, the defendant claims to be a knight and demands judgment by his peers. The justiciar declares: "Because you are a knight we wish you to be judged by your peers." And knights were named.

In Year Book 30 and 31 Edw. I., p. 573, a case is given stating that, "When the defendant puts himself on the country it is the will of the justiciar to say by what country he ought to receive acquittance, whether by that where the deed is said to have been committed, or by that where the prisoner was taken" ("taken" is translated from *natus*, which the editor thinks should be read *captus*). [Is not this the best explanation of the passage cited above from Bracton? Was Bracton referring to the right of individual challenge?—F.P.]

In Year Book 14 and 15 Edw. III., pp. 260, 261, the following is found. "Parnung [Parving] (the Justice) said: "In such a case inquest should have been taken by the indictors and others." Willoughby (the defendant) answered: "The sheriff is commanded to make a good jury come, wherefore the affair must be conducted in that way." Parnung:

[39] Bracton, Leges, f. 138 b.
[40] Britton, i. c. 5, § 8.

"Certainly, if the indictors be not there, it is not well for the King."

In statute 25 Edw. III., 5, ch. 3, it is accorded that no indictor shall be put on inquests for the deliverance of those indicted of felonies or trespasses, if he be challenged for that reason by the one indicted.[41] This shews the final result, when members of the jury which originally made the presentment or indictment are to be omitted entirely from the petty jury, if challenged for that reason by the defendant.

It seems unnecessary to state that these deductions are made from the the actual procedure in the cases noted. The evolution of the jury was not brought about by a series of legislative enactments and royal ordinances, but by the practice of the justices itinerant in meeting the various cases that came before them. The jury, therefore, existed in various stages of its evolution at one and the same time, but a careful study of the conditions and cases shews unquestionably the line along which the evolution proceeded, the temporary experiments gradually dropping out and the permanent elements being retained. The four steps in the evolution outlined in this paper are not mutually exclusive, for we know that the method indicated in the third step, for example, still continued in use even after the fourth step had been reached, but the fourth step holds the permanent element which appears in the third step, while all the rest was dropped. Again, it is evident that, by the principle asserted in the right of challenge, the rule of the modern jury was finally reached, leaving no element of its former witness-bearing character, and removing any who had taken part in the indictment, until finally, as at present, it eliminated any who had a previous knowledge of the case.

McGill University, Montreal. CHARLES L. WELLS.

[41] Statutes of the Realm, i. p. 320.

THE YOUNG LAWYER.

Some of the members of this association have lived beyond their allotted three-score years and ten; others, constituting the main body of this organization perhaps, are passing through that period in life which separates youth from age; many have but crossed the threshold of a legal career, with their life's work no more than begun. And while it is of the latter that this paper is to treat, if to those whose course is almost run, and to those who are carrying the heavier burdens of busy mature years, it shall revive the memory of the time when they were young lawyers, and not unpleasantly recall past trials and cares which years have dimmed over or caused them to forget, some good may come of it, in that those who, in their rush for the goal, have heretofore trampled upon the young lawyer, and then pleaded ignorance of his presence, shall be hereafter stopped to deny the existence of a class whose miseries are here dragged from darkness and exposed to public view.

From afar off, in that period which pictures a lawyer as one who, to win his way to fame and fortune, has but to prance and strut before a jury, and who to carry conviction and secure a favourable verdict, has but to bellow and roar into the ears of his auditors, the life of a lawyer seems ideal, embodying all that hopeful youth could desire, a paradise without a flaw. And the years of study preparatory to admission to this land of promise, cast few shadows upon the pleasing outlook, first conceived. True there appears some need for work, some call for incidental toil in the life of the lawyer, but the haze of time which intervenes between the student and the drudgery of later years, so completely obscures the prospective view that slight opportunity affords itself for a true conception of the future and its troubles, which do become intensely real as they confront us. As a student, one may hear it said that the legal profession is overcrowded: one lawyer may brand another as a jackleg or a shyster, for lawyers are ever given to abuse of one another and are horrified that the public so readily adopts their opinion of each other as correct; some dyspeptic may warn that success is not so sure and rewards so great in this chosen field; but these generalities which reach the student's ears are readily banished or treated as exceptions, and

in no wise cloud this paradise conceived in the ignorance and inexperience of youth.

Time, however, makes soon the future of to-morrow the present of to-day, and the youth who comes so joyously to enter the profession soon finds himself within a serious paradise; ere long gravity falls upon him, decorum clothes him, and despair perhaps envelopes him. The flower that budded yesterday seems like to wither and fade ere it blooms at all. The happy dream of youth's ignorance grows dim, and anticipation crowded with hope is supplanted by realization filled with despair. An early frost seems to have destroyed the fruit which imagination creatured as so bountiful.

How well it is that, since be met it must, this shock is encountered in youth, for then when each day is but a day unto itself, little matters possible distress of to-morrow. It is youth's heritage that each day shall dawn rich with hope and great expectations which even the gloom of present want cannot subdue; that for us the sun shall look fresh each morning as we rise to think, hope, struggle and perhaps suffer. Far distant is the day where the sun, however, bright shall have ceased to shine for us, when to arise is but to suffer and to meet distress, when that which springs eternal in the human breast, is more often despair than hope. In truth, youth's ignorance is bliss, twice over, and 'twould be folly to be wise. Yet, with the wisdom of his own conceit, the young lawyer, counted in thousands, comes each year to struggle for his place; with deep consciousness that he is called to aid in seeing that justice be done, with high ideals and firm purposes, full of hope and eagerness, he will have travelled some distance along the allotted course, before his real status, his insignificance and his minuteness shall have fully dawned upon him; for as surely as the woes of childhood are real, the trials of the young lawyer are severe. The starvation period, spoken of so lightly by our well-fed elders, hangs over us as a dark cloud, and as heaven's clouds not rarely cause the traveller to abate his course or choose a more sheltered one, so the clouds which cast their gloom upon the young lawyer often cause him to abandon the law for pursuits where more certain returns come at fixed intervals.

It seems at the time unjust fate which deals so harshly with the young lawyer: when one is of an age to best ap-

preciate the light opera, when trousers of the latest cut and a coat that's just correct, are the heart's delight, a scarcely budding law business refuses to be coaxed into bloom. the law seed planted with so great care, at no small expense, refuses to germinate, and he would adorn himself with fashions' best, must oft be thankful that last year's coat is long enough to hide the wear of trousers still more ancient. He is as one admitted to the banquet room and not allowed to sup; a Lazarus, who would gladly feed on the crumbs which his elders brush aside; a patient Job whose mind is sore afflicted with ulcers of distress; a ship bent on a voyage of years with provisions for but a few days' cruise. And the wolf which has taken his station at the door, is not of flesh and blood, and can neither be driven off nor lured into a trap. The young lawyer's troubles are intangible, like as many ghosts, but like incorporeal hereditaments pertaining to and growing out of the tangible and the real. It seems hardly possible that reared in moderate plenty. there could come this present want. What immense proportions the smallest legal tender note assumes. As things most commonplace pass out of reach how almost enchanting they become. The awakening comes at last, and, struggling to retain our uncertain place on the first rung of the ladder of success, our self-importance, which did long since attain the top, climbs quickly back to hide within us. The serious period has indeed arrived and Barkis, who is so willing to practise law, is forced to admit that the public does not take seriously his advent into professional life. Another struggle to attain the moon has ended by an embrasure of the gate post.

Hard work and patience, perhaps the two most necessary elements for success in the law, are reasonably certain to bring due reward. and the early years of tribulation serve as the test of our fitness of life's larger tasks. Lincoln in response to a letter from a prospective law student, said that the mode of obtaining a thorough knowledge of the law was very simple, though labourious and tedious, and that "work, work, work is the main thing." True in 1860, when it was written, it is not less true to-day. However, much the young lawyer may fitly pray to be carried to the skies on flowery beds of ease, if he would reach the heights or even mediocrity in the legal profession, and if he would fit himself for the most ordinary tasks it can be only by work, work, work.

Trying each day to better fit himself for his work he has no time to waste. No day is so long but it is too short for him to surmount the obstacles ahead. Thrown into a nervous sweat when called upon to draw a simple deed spending hours over the wording of a business letter, unable to distinguish a præcipe from a share of mining stock, he may be expected to digest a legal proposition with about the same ease that a toothless man masticates a tough steak. Taking himself seriously, as no one else does, he may master the smaller obstacles which beset his way, and in time learn to take money from a client with almost as much ease as an older practitioner. But the pathway which leads to his door is travelled mostly by the poor, and he has little to expect in the way of large fees. Any dreams of sudden wealth are like to vanish ere his freshly painted sign has dried; the poor man's lawyer, his retainer is the widow's mite, and how often is he told in a given case that he has been sufficiently paid in experience. Disappointments constantly attend him, and the young man who seeks ease of body and peace of mind should have himself vaccinated against the law business. Oppressed with numerous wants of his own that he cannot satisfy is it any wonder that a tainted fee sometimes tempts him. Disappointed to-day in the hope of yesterday, advancing so slowly that he seems rather to recede, noting the seeming gain of others more crafty, and with no regard for methods, the way seems at times extremely hard. Defeated in a trial where victory should be his, when opposed by counsel skilled in the art of befogging the minds of the jurors, he sometimes wonders if there are not more stage lawyers off the stage than on, and again, unable to get to the jury with his cause, he feels at times like poor Smike who used to tap his forehead and say, "You might knock here all day and find no one at home."

However diligently he may seek the rule of success and however earnestly he may apply it this does not supply the actual needs of the body during a period when clients, however numerous, are not his. Study of the latest Supreme Court decisions or of the oldest fundamental principles only produces a fatigue which present income cannot alleviate. Patience has no present market value and cannot be exchanged for food and clothing; banks do not take it as a form of security. Needful element as it is, it is like an estate in expectancy upon which we cannot realize. If only there

were a clearing house that the checks of patience would go through, how independent might the young lawyer be. Compelled to meet the absolute needs of the body, expected to have walls lined with books, called upon to contribute to this church and that foreign mission, to aid the compaign fund, to help every public charity, to belong to clubs, and perhaps defeated in the race for office because he has not a wife and half a dozen children,—all this at a time when his income would drive a hod-carrier to strike; it seems to resolve itself down to this: that the world expects everything from the young lawyer and has nothing to give in return. Loafers gather in his office and fondly imagine they have kept him from getting lonesome. The man who creeps into Judge Blank's office with a thousand dollars' worth of business and an air of one who expects to have the dogs loosed upon him, will bolt into the young lawyer's office, with no business in hand, and arrange himself in a state of repose among well-ordered papers on the desk, and proceed to shine his trousers on the scanty furniture for half days at a time, unconscious of the fact that he not only keeps the young lawyer from work but drives him to silent profanity. It is remarkable how many friends a young lawyer gathers about him within a few months after he arrives and how little business they all have.

Abused in many respects and his time squandered by thoughtless people, the young lawyer soon learns that while his opinion is constantly sought, it is paid for at the value a parasite places upon it—nothing. With many the impression prevails that the payment of a small fee for legal services carries with it the purchase of both time and soul. So often, sad to say, be the lawyer young or old, the client is not disappointed in this respect. The most trusted and perhaps the most distrusted of all men, the lawyer, from the very commencement of his career undergoes a continual trial of fire and it is too much to expect that all should come out unscathed.

One hundred and fourteen law schools had in attendance over nineteen thousand law students in the year 1910, and the graduates that year numbered over forty-two hundred, an increase of almost one-third over the preceding year. In law schools, with the exception of the law departments of about one dozen universities, admission is readily granted to graduates of high schools. There are a number of law schools

which have courses of only one and two years; while a greater number have a three-year course. Some few require a given amount of college work on the part of those seeking admission, and during the year 1909-1910 there were enrolled in one law school 765 students, all except six of whom were college graduates. With this lack of uniformity of requirement for admission and with each State fixing its own standard for admission to the bar, there can result no uniformity among the young lawyers. To the credit of our law schools it can be said, however, that with all the varying of standards and in spite of the open door policy to many of the States, few emerge from these many schools and seek admission to the bar without the feeling that they are at the gateway of an honoured profession, where the standard of both private and professional conduct should be high, and where the burden of assisting in the administration of justice is one which the newcomer should ever try to bear. As the child intuitively honours its parents and can ascribe no evil to them, the lawyer newly admitted to the bar, passing from the best influences of a well conducted school, looks upon the profession of the law as second to none, honoured by those who comprise it, and who are engaged in making our human laws an approximation to the divine law. And here again it is with regret that the young lawyer must come to recognize the error of his first conception; to realize that those upon whom this burden is cast have so often perverted their better selves and helped to contaminate so often rather than to elevate. We may parrot the phrase "honoured profession"—a phrase now seldom used except by lawyers, but let young and old alike do their fair share in making our profession deserve the appellation. To boast and brag and heap laurels on ourselves is but to fall to the level of one whose chief glory lies in his illustrious ancestry.

Early training tends to make of the young lawyer the first citizen, and why should he not in development attain the fullness of his growth. The opportunity lies with each in a great measure to choose what path he will, to adhere steadfastly to the higher standards and in keeping his own name above reproach so tend to elevate his chosen calling.

Lincoln gained his first knowledge of the law while he kept store at New Salem. "When not waiting on customers he could be found lying on his back in the grass with his feet propped high against the shady side of the tree trunk;

his lank body slowly squirming about to keep out of the sun, and his mind so absorbed in Blackstone that he seemed wholly indifferent to business." Thus this raw frontiersman, the product of the log hut, without early educational advantages, enduring privations and want, builded the foundation which the trials of later years tested so severely. Living the life of one who made his profession one of honour, not of lucre, unable to face a jury unless he felt the justness of his client's cause, fighting with earnestness in behalf of right, what an inspiration comes to the young lawyer from the study of so noble a career.

Perhaps history has dealt kindly with us in leaving unwritten many unpleasant details of an earlier period; the profession of the law may have receded in some respects, surely it has advanced in others, but that there is room for larger growth and that no little danger is to be feared from the growing spirit of commercialism which has tainted our profession there can be no doubt.

Shakespeare makes Hamlet protest against the law's delay, and after centuries have passed we have the problem with us still; the law itself, the courts and the lawyer stand at the bar of public opinion most harshly criticized if not condemned, and some taint of guilt may be inferred from the fact that they have been driven to the defensive. If this wholesale public criticism is unjust, time will clear the profession of the charge; if just, the young lawyer must not be content to "follow a multitude to do evil." The profession in its entirety can be no better than the members who comprise it, and the young lawyer who, as often is the case, struggles through a law course unassisted, and then endures a period of from two to ten years, with want and despair as his constant attendants, only to look lightly upon his duties as a lawyer, once solid ground is gained, must some time come to realize that this has been effort worse than wasted.

History writes of nothing material that is to endure, but of those who have striven for the ideal time will ever devote its choicest pages. To the young lawyer, passing by slow degrees from youth to maturity, from the unskilled to the trained, from the state of being a young lawyer to that of being an old lawyer, and finally coming to that period where little remains but memory, there is given the power to make that memory a joy if he wills; to make the retrospect bright, with the sense of having been a lawyer above a code of legal

ethics, and of having led an honourable career, however, obscure may be his name, and, finally, in enjoying the satisfaction which springs from a sense of duty well done, he may hope to reap a fair measure of the harvest of contentment for himself and at the same time reflect just credit upon the profession which he honours.

RALPH DEMPSEY.

AN IMPERIAL COURT OF APPEAL.

At the recent Imperial Conference the question of creating one final Court of Appeal for the whole Empire was discussed. Mr. Asquith presided, and the Lord Chancellor and Mr. Haldane were present, in addition to the Colonial Premiers.

The following is the official report of the proceedings:—

Notice had been given of the following resolutions:—By the Government of the Commonwealth of Australia:—"That it is desirable that the judicial functions in regard to the Dominions now exercised by the Judicial Committee of the Privy Council should be vested in an Imperial Appeal Court, which should also be the final Court of Appeal for Great Britain and Ireland." By the Government of New Zealand:—"That it has now become evident, considering the growth of population, the diversity of laws enacted, and the differing public policies affecting legal interpretation in His Majesty's Oversea Dominions, that no Imperial Court of Appeal can be satisfactory which does not include judicial representatives of these Oversea Dominions."

THE AUSTRALIAN VIEW.

MR. FISHER, in moving the Commonwealth resolution, said that they wished to advance the view that it was advisable to have one Imperial Court to which all cases could be submitted for final decision. The constitution of that Court need not be gone into at the moment.

MR. BATCHELOR pointed out that there were at present two Courts of Final Appeal in the Empire—one the Judicial Committee of the Privy Council for the Crown Colonies, India, and the Oversea Dominions, and the other the House

should be heard consecutively and a time fixed for their hearing convenient to the Dominion concerned, so that a Judge from that Dominion might be present. Having regard to the complex nature of the jurisdiction, the best course would probably be to have always a wide membership of the Judicial Committee and that a selection should be made according to the nature of the case to be tried. That was done at present, so far as there was the necessary judicial strength. Another point for consideration was the different rules which prevailed in different Dominions as to special leave being required, as to the limit of the amount involved, as to the nature of the security to be given, and so forth. With regard to the United Kingdom, the Government were not prepared to recommend that the personnel of the judicial body in the House of Lords should be changed. It was already possible to add any distinguished Judge from the Dominions. If each Dominion would say what kind of Court they preferred and the class of Judges they wished to see, the Home Government would do its very best to meet their views. His own idea was that they should add to the highest Court of Appeal both in the United Kingdom and for the Dominions and Colonies by selecting two English Judges of the finest quality, that the quorum should be fixed at, say, five, and that the Court should sit successively in the House of Lords for United Kingdom appeals and in the Privy Council for appeals from the Dominions and Colonies. In that way they would have substantially the same Court in its full strength for both classes of appeals.

Attendance of Colonial Judges.

Sir Joseph Ward pointed out that in order for a New Zealand Judge to deal only with New Zealand cases it would be necessary for him to leave New Zealand for six months, and then perhaps have only one case to deal with. He and his colleagues would have no objection to Canadian or South African Judges sitting in New Zealand cases, but it would hardly be practicable for New Zealand Judges to come over to deal only with New Zealand cases.

Lord Haldane remarked that in connection with a Maori land case which occupied nearly ten days before the Privy Council it would have been useful if they could have had a New Zealand Judge present, as an assessor, to make sure

that no points of importance on a long series of special statutes were missed.

SIR JOSEPH WARD said that the majority of cases from New Zealand would have reference to native lands in regard to which there was much difference of legal opinion, and it was of the greatest importance that there should be present a Judge who knew the customs of the natives, which had to be considered in such cases.

MR. ASQUITH pointed out that if the Court sat in full strength it would meet the complaint sometimes made with regard to the Judicial Committee being a scratch Court and too few in numbers. He had often argued cases in the Judicial Committee before three Judges, which he thought was hardly fitting, seeing that they might be appeals from the Supreme Courts of various Dominions.

SIR JOSEPH WARD asked if the Lord Chancellor had any objection to there being only one Court by merging the Judicial Committee of the Privy Council with the House of Lords, instead of one for the United Kingdom and another for the Overseas Dominions, and make the one a final Court of Appeal.

LORD LOREBURN said it was practically the same thing, and the system which he had suggested might develop into the one Court. Personally he would be very well pleased if it did. Our own system was somewhat complicated, but he did not think that the legal profession or the people at large at home had any quarrel with the existing final Court of Appeal.

LORD HALDANE said that the Lord Chancellor's proposition was really to make one Court, but to keep the old forms.

MR. MALAN said that in South Africa there was no right of appeal from their Appeal Court to any Court outside the Union. But every subject had the right to petition the King, and any such petition would, as a matter of practice, go to the Judicial Committee of the Privy Council. If the committee gave leave to appeal, the case would be considered on its merits. It was not anticipated that there would be more than one such case in five or ten years. Therefore, as far as South Africa was concerned, they were generally satisfied with the present practice. It was, however, felt that the Judicial Committee was in some respects no ordinary Court of law at all, and it would be an advantage

to have its procedure in conformity with that of the other Courts of law. The appeal to the King was one of the connecting links of the Empire, and on purely sentimental grounds it would be a right thing to have one final Court of Appeal for the whole Empire. A great deal sometimes depended on a name, and if they had one Imperial Court of Appeal, perhaps in two divisions, one dealing with appeals from the United Kingdom and the other with appeals from the Dominions and India, leaving the Lord Chancellor certain discretion in constituting the Bench of the respective divisions, the difficulty might be solved.

MR. BRODEUR said that in Canada they had been very well satisfied with the existing system of appeals before the Privy Council. In view of the dispositions of the British North America Act and of the different procedures and practices of the various provinces, it would be somewhat difficult to make a change. Every one who had practised before the Judicial Committee must have been impressed with the great breadth of mind which prevailed among its members. Not only might a change be objected to by some of the provinces, but it would be a reflection on the present Court, which had given satisfaction.

PERMANENT COLONIAL JUDGESHIPS.

SIR JOSEPH WARD said that there was not the slightest idea of reflecting on the Privy Council or its members. If such a line of argument were followed, no change at all would ever be made. New Zealand were in the peculiar position that out of their limited area some 7,000,000 acres of land were owned by natives. When litigation in connection with this land arose, native customs had to be taken into account, and it was felt that when important cases of this kind came before the Privy Council it would be a great advantage if they had a representative Judge from New Zealand present. In view of the statement of the Lord Chancellor, he would not urge that the Judicial Committee should be merged in the House of Lords. He suggested, however, that in addition to the present members of the Judicial Committee there should be a permanent Judge from each of the important Overseas Dominions. The difficulty with regard to a Judge coming over specially was that in all probability he would have to deal with cases

which had already come before him in New Zealand. If permanent Judges were appointed as he suggested, possibly for five or seven years, after which they would resume their work as Supreme Court Judges, it would not only get over various difficulties which stood in the way of other proposals, but would greatly assist towards securing that uniformity and co-ordination of the law in different parts of the Empire which was so eminently desirable. In view of the importance of the interests involved, the question of expense, so far as each Dominion was concerned, was a secondary matter. New Zealand would hail with supreme satisfaction the presence of Judges from the other Dominions in cases in which New Zealand was concerned, and he could hardly think that there would be any objection on their part on practical grounds to a New Zealand Judge taking part in cases from the other Dominions.

DR. FINDLAY said that the creation of one final Court of Appeal for the Empire would satisfy a great Imperial sentiment, and although the personnel would differ very little from that of the present Court, it would constitute a step towards closer union. The presence of a resident Colonial Judge would obviate the necessity for sending over at great expense counsel from, for instance, New Zealand to see that the Privy Council were instructed on the peculiar features of New Zealand law. In any fair conception of the burdens of Empire there should be no objection to the Dominions sharing the cost of the Imperial Court of Appeal by paying the salary of one of their own Judges.

SIR E. MORRIS said that very few appeals came from Newfoundland, and they were generally satisfied with the present arrangements. At the same time, if there was a desire for change on the part of Dominions who were more largely concerned in the work of the Judicial Committee, he would not consider himself justified in voting against the resolution. The proposed change was largely one of name, the Imperial Court of Appeal instead of the Judicial Committee of the Privy Council. There could be no objection to each Dominion having a representative on the permanent Court of Appeal. The principle was in harmony with the general sentiment of unification now prevailing.

MR. ASQUITH asked whether the other Dominions would approve of Sir Joseph Ward's suggestion that each Dominion should appoint a resident Judge who should sit not

only in cases affecting his own Dominion, but in appeals from all the Dominions.

MR. BRODEUR said that in view of the different systems of law prevailing in Canada they would prefer to adhere to the existing system.

MR. FISHER said that in Australia they desired to have an Australian final Court of Appeal; failing that, they desired to have one Court of Appeal in England. He was not at present prepared to accept Sir J. Ward's suggestion.

MR. MALAN said that South Africa would not send a resident Judge to serve on the Committee.

SIR E. MORRIS said that Newfoundland would not be prepared to appoint a man and pay his salary and expenses, in view of the small number of cases from that country.

MR. ASQUITH said that he would much prefer the suggestion that the cases from a particular Dominion should be fixed to be heard at a time to suit the convenience of a Judge from that Dominion. He thought that this would substantially meet Sir J. Ward's view that when cases from a particular Dominion came on it would be an advantage to have a local Judge present, and the Government would be glad to meet that view as far as possible.

ONE COURT IN TWO DIVISIONS.

LORD LOREBURN agreed that if there were only one or two cases, the sending over of a Judge would be a large order for a comparatively small result. As he understood the discussion, there was a general agreement to the following effect:—That there should be for the whole British Empire one final Court of Appeal in two divisions, one for the United Kingdom, consisting of the same persons who were now entitled to sit in the House of Lords, and the other for the Overseas Dominions, consisting of the persons now entitled to sit on the Judicial Committee, with such further additions as might be agreed upon, and that it should be strengthened by the addition of two English Judges.

SIR JOSEPH WARD thought that that represented the only *modus vivendi*.

MR. FISHER said that he would withdraw his resolution and substitute the following:—"That, having heard the views of the Lord Chancellor and Lord Haldane, the Con-

ference recommends that the proposals of the Government of the United Kingdom be embodied in a communication to be sent to the Dominions as early as possible."

MR. BATCHELOR said that they looked forward to one final Court of Appeal for the Empire. The two divisions seemed to be a practicable arrangement for the time being, but it ought to be understood that the proposal was merely for the time being. The original resolutions were then withdrawn, and the substituted resolution was unanimously agreed to.

THE LAW OF CONSPIRACY.

MR. FISHER formally moved:—"That the members of this Conference recommend to their respective Governments the desirableness of submitting measures to Parliament for the prevention of acts of conspiracy to defeat or evade the law of any other part of the Empire; that the Imperial Government make similar representations to the Government of India and the Crown Colonies."

Mr. Batchelor pointed out that at present it was often impossible to reach the people really responsible, and he suggested that the question should be referred to a Committee to see if there was any possibility of securing greater co-operation on the subject throughout the Empire.

After a short conversation, the resolution was withdrawn on the understanding that the Home Government would communicate with the non-self-governing parts of the Empire to ascertain whether it was practicable for them to deal with the matter by legislation.

A memorandum has since been issued by the Government containing the following summary of the proposals made at the Imperial Conference as to the establishment of an Imperial Court of Appeal:—

1. At present, the House of Lords is the Supreme Court of Appeal for the United Kingdom, and the King in Council (in effect the Judicial Committee) is the Supreme Court of Appeal for the rest of the Empire.

2. It is proposed to take a first step towards combining these Courts into a Supreme Court of Appeal for the Empire, and towards strengthening them by adding to the number of Judges composing them.

3. The scheme is that the Home Government should add two selected Judges to the Lords of Appeal. There would then be six Law Lords devoting their whole time to sitting in the two Courts.

4. In addition, the Lord Chancellor would, as now, preside whenever he is present, and all who are now qualified to sit in either the House of Lords or the Judicial Committee would be able to sit as now.

5. In this way the appeals of the United Kingdom and of the rest of the Empire respectively would be heard by the same Judges who hear them now, with the addition of two Law Lords to both Courts, but the two Courts would both be branches of the Imperial Court of Appeal.

6. Except where it is necessary that the House of Lords and the Judicial Committee shall sit simultaneously it is contemplated that the Court shall sit in full strength first at the one and then at the other.

7. It will be necessary that the conditions and method of appeal from different parts of the Empire shall be suited to the local requirements, and it is not practicable to attain uniformity in these respects, at all events at first. But as the Judges will be almost entirely the same for all kinds of appeals, it seems probable that a greater degree of uniformity may be reached, and possibly in time all differences may be effaced.

8. It is further proposed that, in accordance with the wishes expressed by the Dominion representatives, the practice of the Judicial Committee shall be modified so that in Dominion cases any dissentient Judge may be free to give his reasons if His Majesty's consent is given to this change.

RELIEF AGAINST FORFEITURE.

The decision of the English Court of Appeal in *Rose* v. *Spicer*, *Rose* v. *Hyman* (1911, 2 K. B. 234), places an important limitation on the power of the Court to grant the statutory relief against forfeiture. The appellants, Hyman and Rosenthal, the defendants in the second action, were the assignees of a lease of the 28th of May, 1845. By that lease a piece of land at Hackney, with the chapel then in course of erection thereon, was demised to certain lessees

for ninety-nine years (less ten days) from the 25th December, 1842, at a rent of £33; and the lease contained a covenant by the lessees to complete the chapel and keep it in repair, and not to alter the front elevation without the consent in writing of the lessor. There was also a covenant not to carry on certain trades, being in the main trades of an offensive nature, and a general covenant against the use of the premises in such a manner as to be a nuisance to adjourning occupiers, with a proviso for re-entry for arrears of rent and a breach of covenant. The chapel was completed and used for a place of religious worship under the terms of a trust deed until 1909. At that time the lease was vested in James Spicer as the sole surviving trustee. In the early part of 1910 Spicer entered into an agreement to sell the premises, and the benefit of this agreement became vested in Hyman and Rosenthal, who proposed to use the premises for a kinematograph theatre. In July, Mrs. Rose, the then reversioner, served a notice to repair on Spicer, and in November, on his default, she commenced an action to recover possession. On the 1st of December, 1910, the premises were assigned to Hyman and Rosenthal for the residue of the term. Thereupon Hyman and Rosenthal entered into possession and proceeded to put the premises into thorough repair and to make structural alterations required to adapt them to their new purpose. The work involved the removal of some iron railings which surrounded the property on two sides and enclosed a space twelve feet wide between the chapel and the public footway, the opening of a new door in the outer wall, the construction of two new fireproof staircases, the raising of the floor to a uniform level, and the construction of new offices. In January, 1911, while these works were in progress, Mrs. Rose commenced an action for recovery of possession against Hyman and Rosenthal. The latter applied for relief against forfeiture, but this was not allowed by the Master, who left the question of relief till the trial of the action. His order was affirmed by Ridley, J, and the appeal was against that learned Judge's decision.

Prior to Lord St. Leonard's Act (22 & 23 Vict. ch. 35), in regard to non-insurance, and to the Conveyancing Act, 1881, it was well settled that no relief could be given against forfeiture of a lease except under circumstances of fraud, accident or mistake: *Bamford* v. *Creasy* (1862, 3 Giff. 675).

There was originally a disposition to grant relief in equity in cases where compensation could be made: *Sanders* v. *Pope* (12 Ves. 282), but this was not finally admitted, and equitable relief was confined to cases of forfeiture for non-payment of rent: *Bracebridge* v. *Buckley* (2 Price 200), *Bowser* v. *Colby* (1 Hare p. 134.) This limitation on the jurisdiction of the Court was removed by section 4 of the Act of 1881, which by sub-section 2, with certain exceptions not extending to waste or breach of covenants to repair, enabled the Court to grant such relief as "having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances," it should think fit. The "foregoing provisions" are those of sub-section 1 under which the lessor is prohibited from enforcing the forfeiture until he has served notice requiring the lessee to remedy the breach and to make compensation in money, and unless the lessee fails within a reasonable time to comply with the notice. Thus, in considering whether relief is to be granted, the Court is bound to consider the conduct of "the parties" in regard to the service of the notice and compliance therewith. If the Court decides to grant relief, the terms of relief may include an injunction against any like breach in the future.

In the present case, Cozens-Hardy, M.R., deduced from these provisions the general principles upon which relief is to be granted. In the first place, the applicant must comply with the statutory notice: that is, he must, so far as possible, remedy the alleged breaches and pay reasonable compensation for breaches which cannot be remedied. In the second place, if the breach is of a negative covenant, the applicant must undertake to observe the covenant in the future, or at least must not avow his intention to repeat the breach complained of. In the third place, if the act, though not a breach of a negative covenant, amounts to waste which would be restrained by an injunction, the applicant must undertake to make good the waste if possible. In the fourth place, if the act complained of does not fall under either the second or third head, but is one for the recovery of damages not merely nominal, the applicant must undertake not to repeat it. The Master of the Rolls summarised these various rules by saying that the plaintiff must come into Court with clean hands, and ought not to be relieved if he avows an intention to continue or to repeat a breach of covenant.

The applicants were willing to remedy the breaches alleged in the notice to repair so far as the changes in the building would admit, and the use of the building for its new purpose was not a breach of any negative covenant; so that their claim to relief could not be refused under the first or second head; but in the opinion of the Master of the Rolls the alteration of the premises, by the removal of the railings and opening a new door, and constructing new staircases, constituted waste against which the Court would grant an injunction. Hence he held that relief ought to be refused under the third head, and, possibly also, under the fourth head, on the ground that the alterations were a breach of the covenant to repair for which substantial damages could be given, and which the applicants avowed their intention of continuing. "They do not," he concluded, "come into Court with clean hands, and they are not entitled to relief except upon terms to which they are not willing to submit," and hence he thought the appeal ought to be dismissed. Moulton, L.J., was of the same opinion, for the short reason, which he described as axiomatic, that the Court will not grant relief to a lessee who persists in a continuing breach, and who informs the Court that it is his intention so to persist. "Whatever other terms the Court feels justified in requiring as a condition for relief, the applicant must be willing to repair the breach so far as it has been committed, and put himself in a position in which he can observe the covenants in the future." Hence since the changes were a breach of the covenant to repair and maintain the chapel and premises, and this breach was to be persisted in, relief could not be given.

But these judgments appear to assume a great deal in favour of the lessor and to pay little attention to the proprietary interest of the assignees of the term, and, what we may perhaps describe as a more reasonable view of the respective claims of the parties was introduced by the judgment of Buckley, L.J. He was not impressed by the removal of the railings, since these appear not to have existed at the time of the demise, and the applicants were willing to pave the demised ground so as to distinguish it from the public footway and occasionally to put up a fence, and inasmuch as there was no covenant against the use of the premises otherwise as a chapel, he attached no importance to their diversion from this purpose. Moreover, the applicants were willing to deposit a sum of money sufficient for the restoration of the

premises to their original state at the end of the lease. Under these circumstances the Lord Justice considered that the changes were no greater than might reasonably be made having regard to the right of the applicants to change the user of the premises, and he considered that they were entitled to relief.

It may be questioned whether there was any necessity for the Master of the Rolls to lay down rules which must inevitably have the effect of fettering the discretion which the statute has vested in the Court, and also whether it is so axiomatic as Moulton, L.J., said, that relief must be refused if there is a continuing breach. As above pointed out, the Court is bound under sec. 14 to have regard to the conduct of the parties in relation to the notice required by sub-sec. 1, but it is significant that the sub-section refers to "parties" and regard must, therefore, be had to the conduct of the lessor as well as of the lessee. It may be unreasonable for the lessor to seek to interfere with the lessee's mode of enjoyment of the premises, even though this may not be strictly in accordance with the terms of the lease. The lessee has a proprietary interest in the property as well as the lessor, and in ordinary circumstances the interest of the lessor is strictly protected if there is security for the property being handed back in its original state at the end of the term. If it is intended that a building should be used for a particular purpose only, it is easy to insert a covenant to that effect. It is well known that buildings originally intended for public worship often cease to be required for that purpose, and in such a case there seems to be no reason why, in the absence of a negative covenant, they should not be adopted to some other use for the remainder of the term. It is possible that the present decision will be found to impose an inconvenient fetter on the exercise by the Court of its discretionary power to grant relief.

EFFECT OF DEVIATION ON CONTRACT OF CARRIAGE.

It has long been settled that, under a contract to carry goods by sea, there is an implied undertaking on the part of the ship-owner not to deviate from the course of the chartered voyage. This undertaking is, however, subject to one exception, viz., if the deviation is reasonably necessary for the safety of the ship or cargo or for saving human life. The rule may be conveniently defined as relating to a "voluntary deviation," and the exception to an "involuntary deviation." When, therefore, a ship-owner has allowed the vessel to deviate from the course of her chartered voyage, he becomes liable for the delay, and also in respect of any loss or damage that may happen to the goods, as he has lost the benefit of exceptions in the special contract. The fact of a voluntary deviation has been admirably summarized by Moulton, L.J., in the case of *Thirley* v. *Orchis Steamship Co.* (1907), 1 K. B. 660, at p. 669, as follows: "A deviation is such a serious matter, and changes the character of the contemplated voyage so essentially, that a ship-owner who has been guilty of a deviation cannot be considered as having performed his part of the bill of lading contract, but something fundamentally different, and therefore he cannot claim the benefit of stipulations in his favour contained in the bill of lading. In what position, then, does he stand? He has carried the goods to their place of destination, and is therefore entitled to some remuneration for that service, of which their owner has received the benefit. The most favourable position which he can claim to occupy is that he has carried the goods as a common carrier for the agreed freight. I do not say that in all cases he would be entitled as of right to be treated even as favourably as this."

The law as to the effect of deviation, qua deviation, being thus well established, it had never been decided until the trial of the case of *Kish* v. *Taylor* (1910, 2 K. B. 309; 1911 1 K. B. 625), whether a deviation for the purpose of saving life and property, although occasioned by the unseaworthiness of the ship when she started on her voyage, was an act which put an end to the special contract of affreightment and relieved the charterers or the bill of lading holders, as the case might be, from their obligations under the charter-party or bill of

lading. In that case the plaintiffs, who were the owners of the S. S. Wearside, chartered her to proceed to Mobile and Pensacola and there load a full and complete cargo of timber for carriage to Europe. The charter-party conferred upon the plaintiffs a lien for dead freight, and by the bills of lading the cargo was made deliverable to the shippers' order or their assigns, "freight and all other conditions as per charter-party." The charterers failed to load a complete cargo, and the plaintiffs, in order to minimize their loss, loaded other cargo, at a lower rate of freight than that provided by the charter-party; but they loaded an excessive quantity on deck, which had the effect of making the ship unseaworthy, and consequently she lost her balance in a gale and was obliged to put into Halifax (N.S.), for repairs, after which she completed her voyage. The necessity for putting into Halifax for the purpose of saving life and property was admitted, but the novel point raised by the case was whether there had been a justifiable deviation which would keep alive the special contract of carriage, in spite of the fact that the ship-owners had made the ship unseaworthy at the commencement of the voyage. The main contention on behalf of the ship-owners was that deviation in a legal sense means a purely voluntary deviation, and that where the deviation is involuntary, even where the prior conduct of the ship-owners really occasioned the departure from the voyage, the deviation is excusable. On the other hand, it was strenuously contended on behalf of the bill of lading holders that where the real cause of the deviation was the wrongful act of the ship-owners in sending the vessel to sea in an unseaworthy condition, the ship-owners could not be heard to say that the deviation was for the purpose of saving life and property; and it was also suggested that the obligation to have the ship seaworthy at the commencement of the voyage was a condition of the contract, in the sense that unless the condition was fulfilled the contract could not be enforced. The case was tried in the first instance before the late Mr. Justice Walton, whose knowledge and experience of commercial law, and especially in connection with shipping matters, was unrivaled. The learned Judge came to the conclusion that the ship-owners retained the benefit of the exception in the bill of lading (see 1910 2 K. B. 309, at p. 316), on the somewhat narrow ground that "it would be going a great deal further to say that putting into a port of

refuge when it was necessary to do so was an improper deviation because, but for the unseaworthiness, it would not have become necessary." It is only fair to say, however, that the case raised other very important and complex questions for the learned Judge to decide.

The case raised in the Court of Appeal comprised the one point only, viz., whether there had been such a deviation as avoided the special contract of carriage, when the judgment of Mr. Justice Walton was reversed, and the point at issue was decided in favour of the bill of lading holders. The Court admitted that if the ship-owner could not, as between himself and the holders of the bill of lading, set up that the deviation which occurred was, in fact, a deviation justified by necessity, he could not enforce the rights in question against the owners of the bills of lading. In deciding the case against the ship-owners the Court of Appeal relied very strongly on the judgment of the Privy Council in the case of *Strang, Steel & Co.* v. *Scott* (14 App. Cas. 601), chiefly on the ground of that case deciding that where the necessity for the act arises from his own default, the ship-owner is personally disentitled to appeal to the necessity of the act in order to shelter himself from its contractual consequences. In that case the master of the ship jettisoned some goods in order to save the ship, and while it was admitted that the act was reasonably necessary for the safety of the ship, it was proved that the danger in which the ship lay was due to his own negligence. The members of the Court evidently regarded the case as another example of the principle that a man may not take advantage of his own wrong.

It is possible that the House of Lords may be invited to consider the important point raised by the recent, but meanwhile, as the law stands, a heavy responsibility rests upon the master of a ship, who, in like circumstances, has to elect whether he will risk life and property in order to preserve the benefits of the contract which his owners have made, or take steps to safeguard life and property at the risk of losing the benefits of the special contract of affreightment.

STORMS AND TEMPESTS AS ACTS OF GOD.

The term "act of God" in the broad and comprehensive sense may be said to include many events and occurrences which in law would not be regarded as such. Indeed, it has been said that "everything may be said to be mediately or immediately the act of God;"[1] or, as Lord Mansfield has stated it, everything is an act of God which happens by His permission and by His knowledge.[2] But it seems improbable that, even in the popular sense, would so wide a scope be ascribable to the term.

In that sense in which the phrase "act of God," or the corresponding term of the civil law *vis major* is applied in jurisprudence, it bears a much restricted meaning, which is not susceptible of accurate and comprehensive definition, and, in fact, a precise definition is not required in the administration of justice,[3] it being deemed sufficient to ascertain the kind or character of events which may be reasonably anticipated to occur.[4] That is, in order to determine whether or not a particular occurrence produced by purely natural causes is, in the legal sense, to be deemed an act of God, depends upon whether, under the circumstances, the happening of such an event might have been foreseen by the exercise of human care and foresight.

The books, however, supply some criterion by which the meaning of the term in its legal acceptation may be fixed. It is generally defined as a natural necessity or inevitable accident produced by immediate physical causes which are irresistible, or negatively, as something which could not have been occasioned by the intervention of man or prevented by the exercise of human care, diligence, or foresight, and the use of these appliances which the situation of the party renders it reasonable that he should employ. It has also been characterized as merely something superhuman in contradistinction to the act of man.[5]

[1] *Gordon* v. *Buchanan*, 5 Yerg. 81.

[2] *Forward* v. *Pittard*, 1 T. R. 31, 1 Revised Rep. 146, 1 Eng. Rul. Cas. 216.

[3] *Ewart* v. *Street*, 2 Bail. L. 157, 23 Am. Dec. 131; *Olsen* v. *Meyer*, 46 Neb. 240, 64 N. W. 954.

[4] *Olsen* v. *Meyer*, supra.

[5] *Chicago & N. W. R. Co.* v. *Sawyer*, 69 Ill. 285, 18 Am. Rep. 613.

Thus it will be seen that the essential legal elements of an act of God are, first, something extraordinary resulting immediately from a natural cause, and, second, the absence of intervention of man. From this, and the nature of the occurrences under discussion, it is at once obvious that the latter element may be eliminated. This being granted, the subject therefore resolves itself into a determination of what events or class of events occasioned by the elementary forces of nature unconnected with the agency of man or other cause may be regarded as having been caused by an act of God. This query may be best answered, perhaps, by a review of the more important decisions which bear upon the question.

Atmospheric Disturbances as Acts of God.

At the outset, it may be conceded that damage caused by such unusual and extraordinary manifestations of the elements as lightning,[6] cyclones of great violence,[7] hurricanes,[8] and tornadoes,[9] may be considered as having resulted from what in legal parlance is denominated an act of God. And the same conclusion has been reached as regards wind storms of such violence that their occurrence could not reasonably have been anticipated or foreseen,[10]—weather of "extreme violence" characterized as a "tempest,"[11] a "tempest" so violent as to necessitate the throwing of goods overboard to preserve the vessel and crew,[12] a sudden "whirlwind" sufficiently severe to throw a popcorn wagon from the centre of a raised railroad platform to the ground, at least in a locality where storms of that nature and severity are not prevalent.[13] a "storm which put everything adrift,"[14] a storm of sufficient

[6] *Quincy Gas & Electric Co.* v. *Schmitt*, 123 Ill. App. 647; *McCormick* v. *Pennsylvania C. R. Co.*, 80 N. Y. 353.

[7] *Alabama G. S. R. Co.* v. *Quarles*, 145 Ala. 436, 5 L. R. A. (N.S.), 867, 117 Am. St. Rep. 54, 45 So. 120, 8 A. & E. Ann Cas. 308.

[8] *The J. C. Stevenson*, 17 Fed. 540.

[9] *Pennsylvania R. Co.* v. *Fries*, 87 Pa. 234.

[10] *Olsen* v. *Meyer*, 46 Neb. 240, 69 N. W. 954; *International & G. N. R. Co.* v. *Bergman*, — Tex. Civ. App. —, 64 S. W. 999; *Nugent* v. *Smith*, L. R. 1. C. P. Div. 423, 45 L. J. Q. B. N. S. 697, 1 Eng. Rul. Cas. 216.

[11] *The Zealandia*, 48 Fed. 697.

[12] *Gillett* v. *Ellis*, 11 Ill. 579; *Le Case de Gravesend Barge*, 1 Rolle Rep. 79, in which the term was applied by Sir Edward Coke about the year 1601.

[13] *Gulf, C. & S. F. R. Co.* v. *Compton*, — Tex Civ. App. —, 38 S. W. 220.

[14] *Medina* v. *Hanson*, 17 La. Ann. 290.

violence to unroof houses,[15] a "severe gale,"[16] an unprecedentedly severe rain fall,[17] a gale of wind sufficient to blow a railroad car from the track,[18] a "sudden gust of wind" sufficiently violent to have the same effect,[19] a sudden gust of wind extraordinary in its severity and sufficient to sink a hoy,[20] a sudden unanticipated squall or gust of wind,[21] "a flow of wind unheard of or such as rarely occurs,"[22] and a sudden squall not amounting to a storm or tempest, if of such an effect as to defeat all human skill and diligence.[23]

Of course a sudden gust or shift of wind, to amount to an act of God, must have been an "extraordinary occurrence,"[24] or at least so unusual and extraordinary as in its nature not reasonably to be expected,[25] for a wind neither amounting to a hurricane nor extraordinary in its violence is not an act of God.[26]

Rain Storms or Winds.

So it has been held that a rain storm, even though extraordinary, if neither unprecedented nor of such violence that it could not reasonably have been anticipated, does not constitute *vis major*;[27] nor is the springing up in the night of an ordinary wind sufficient to drive fire from a camp fire to a broken bale of cotton 15 feet distant;[28] or inclement weather such as is frequently experienced in the locality;[29] or a landslide caused by a rain of not unusual violence[30] an act of God. It has also been said that, although the wind which may have

[15] *Norling* v. *Allee*, 37 N. Y. S. R. 409, 13 N. Y. Supp. 791; *Uggla* v. *Brokaw*, 77 App. Div. 310, 79 N. Y. Supp. 244.
[16] *Cochran* v. *The Cleopatra*, 17 La. Ann. 270.
[17] *Kansas City, P. & G. R. Co.* v. *Williams*, 3 Ind. Terr. 352, 58 S. W. 570.
[18] *Blythe* v. *Denver & R. G. R. Co.*, 15 Colo. 333, 11 L. R. A. 615, 22 Am. St. Rep. 403, 25 Pac. 702.
[19] *McClary* v. *Sioux City & P. R. Co.*, 3 Neb. 44, 19 Am. Dec. 631.
[20] *Amies* v. *Stevens*, 1 Strange, 127.
[21] *The Lady Pike*, 2 Biss. 141, Fed. Cas. No. 7985; *Fairchild* v. *Slocum*, 19 Wend. 329, affirmed in 7 Hill, 292.
[22] *Spencer* v. *Daggett*, 2 Vt. 92.
[23] *Gordon* v. *Little*, 8 Serg. & R. 533, 11 Am. Dec. 632.
[24] *Elliott* v. *Rossell*, 10 Johns. 1, 6 Am. Dec. 306.
[25] *Mahaffey* v. *J. L. Rumbarger Lumber Co.*, 61 W. Va. 571, 8 L. R. A. (N.S.) 1263, 56 S. E. 893.
[26] *Pasquini* v. *Lowry*, 63 Hun. 632, 44 N. Y. S. R. 339, 18 N. Y. Supp. 284.
[27] *Sawyer* v. *Ives*, Rap. Jud. Quebec. 4 B. R. 389.
[28] *Chevallier* v. *Straham*, 2 Tex. 115, 47 Am. Dec. 639.
[29] *Cannon* v. *Hunt*, 116 Ga. 452, 42 S. E. 734.
[30] *Gleeson* v. *Virgina Midland R. Co.*, 140 U. S. 435, 35 L. ed. 458, 11 Supp. Ct. Rep. 859.

caused the thing complained of, was high and of long duration, if it had not the character of a sudden squall or whirlwind, or anything more than the boisterous and tempestuous weather ordinarily encountered under similar circumstances, it does not amount to the act of God which excuses from liability.[31] Nor is an injury attributable to an act of God which is caused by a wind such as might be expected in the regular course of the seasons;[32] or by a wind "above the average of high winds," but not amounting to a hurricane of such "unheard of violence as to be beyond all contemplation or expectation;"[33] or by a wind of the velocity of 57 miles an hour where such a velocity is quite usual and occurs several times a year.[34] And it has been held that a storm of wind and rain sufficiently severe to drive a train of stock cars standing with set brakes on a switch track which inclined with the wind, on to the main track, does not constitute an act of God.[35]

CYCLONES.

It has also been contended, though unsuccessfully, that even a cyclone sufficient to wreck a train was not an act of God sufficient to relieve a carrier from liability. Such a contention was raised in the case of *Galveston, H. & S. A. R. Co.* v. *Crier*,[36] wherein the Court, in ridiculing the interposition of such a defence, said: "It [the cyclone] unroofed, wrenched from their foundations, and destroyed houses. Its force stopped the train, wrenching and lifting the cars from their trucks, hurling them on either side of the track, and one of them a distance of 150 feet or more into a field beyond; and when it struck the ground whirled it round and sported with it as though it were a top in the hands of a boy. Only the engine and three heavy iron-tanked oil cars held the track against its terrific force. It left death and destruction along its path, and wailings above ruined homes and untimely graves. If this terrible destruction was not the act of Him who 'putteth forth His hand upon the rock and overturneth

[31] *Tompkins* v. *The Duchess of Ulster*, Fed. Cas. No. 14087a.
[32] *St. Louis, I. M. & S. R. Co.* v. *Hopkins*, 54 Ark. 209, 12 L. R. A. 189, 15 S. W. 610.
[33] *Holt Mfg. Co.* v. *Thornton*, 136 Cal. 232, 68 Pac. 708.
[34] *Chicago* v. *Smith*, 95 Ill. App. 339.
[35] *Gulf, C. & S. F. R. Co.* v. *Bell*, 24 Tex. Civ. App. 579, 58 S. W. 614.
[36] 45 Tex. Civ. App. 434, 100 S. W. 1177.

the mountains by their roots,' then may it be said of man, instead of God, 'He stretcheth out the north over the empty place, and hangeth the earth upon nothing.' If not a sacrilege, it is at least preposterous to say that the destruction of this mighty force of nature was proximately produced by the concurrence of the puny hand of man. There is as much reason for saying that the cloud of dust raised by the chariot of a king was increased by the buzzing fly upon one of the wheels, or that the bellowing of the angry bull was augmented by the singing of the gnat seated upon his horn."

Before passing from the subject of wind storms it may be of interest to call attention to one other case, wherein it was contended that the loss was occasioned by an act of God. The case referred to,[37] which is one of the earliest in this country involving the application of the doctrine contended for, dealt not with the violence and severity of the wind, but, on the other hand, with a sudden failure thereof. The facts shew that a vessel while beating up a river against a light and variable wind attempted to change her tack when sailing very near the shore. As the attempt was made the wind suddenly failed, in consequence of which she ran aground and sank. The majority of the Court upheld the defence interposed, and Spencer, J., in delivering the opinion of the Court, said: "Upon a position so plain in my apprehension, as that the sudden cessation of a wind which was competent at the very moment when the vessel began to come about for the avoidance of the shoal, was the act of God, and did not arise from the fault or negligence of man, I am at a loss for further illustration." The decision, however, has been criticized, but it is difficult to distinguish between a sudden gust of wind and a sudden cessation thereof, since as the cause must be the same, and as the physical effect may be the same, why should not the legal effect be the same? But conceding that a sudden failure of wind is in itself an act of God, it may be that any given accident resulting from such a failure could have been avoided by the exercise of human prudence, in which case an element essential to relief from liability on the ground that the accident was caused by an act of God would be lacking. To illustrate, the dissenting opinion of Chief Justice Kent in *Colt* v. *M'Mechen*,[37] was upon the ground, not that the sudden cessation of wind was not an act of God, but that

[37] *Colt* v. *M'Mechen*, 6 Johns. 160, 5 Am. Dec. 200.

the master was negligent in sailing so near the shore under a "light and variable wind" before attempting to come about.

SNOW STORMS.

Another distinct class of storms, and the one in which the question under discussion has most often arisen, is that in which snow has in one manner or another caused or at least contributed to the loss or damage complained of. Upon this phase of the question there is little, if any, conflict among the authorities, it being generally agreed that such storms, if of sufficient violence or duration to obstruct the movement of trains, are an act of God which will relieve the common carrier from liability for loss of goods or for injuries to passengers caused thereby.[38] But it has been said that a snow storm in Missouri in the winter season is not, in law, an act of God,[39] but it is probable that the Court, although not indicating the degree of severity of the storm so referred to, had in mind an ordinary snow storm rather than an extraordinary one.

DEW.

One other instance of a carrier's attempt to relieve itself from the obligation to transport freight without unnecessary delay may not be amiss, although the natural cause complained of (the falling of a heavy dew) may be said to partake of the nature of a storm or tempest in approximately the same degree that a heavy dew partakes of the nature of an act of God as usually understood in law. However, such a contention was raised with seeming seriousness in the United States

[38] *Palmer* v. *Atchison, T. & S. F. R. Co.*, 101 Cal. 187, 35 Pac. 630; *Denver & R. G. R. Co.* v. *Pilgrim*, 9 Colo. App. 86, 47 Pac. 657; *Chapin* v. *Chicago, M. & St. P. R. Co.*, 79 Iowa, 582, 44 N. W. 820; *Reed* v. *Duluth, S. S. & A. R. Co.*, 100 Mich. 507, 59 N. W. 144; *Jones* v. *Minneapolis & St. L. R. Co.*, 91 Minn. 229, 103 Am. St. Rep. 507, 97 N. W. 893; *Ballentine* v. *North Missouri R. Co.*, 40 Mo. 491, 93 Am. Dec. 315; *Pruitt* v. *Hannibal & St. J. R. Co.*, 62 Mo. 527; *Cunningham* v. *Wabash R. Co.*, 79 Mo. App. 524; *Vencill* v. *Quincy, O. & K. C. R. Co.*, 132 Mo. App. 722, 112 S. W. 1030; *Nelson* v. *Great Northern R. Co.*, 28 Mont. 297, 72 Pac. 642; *Black* v. *Chicago, B. & Q. R. Co.*, 30 Neb. 197, 46 N. W. 428; *Feinberg* v. *Delaware, L. & W. R. Co.*, 52 N. J. L. 451, 20 Atl. 33; *Cormack* v. *New York, N. H. & H. R. Co.*, 196 N. Y. 442, 90 N. E. 56, 17 A. & E. Ann. Cas. 949, 24 L. R. A. (N.S.) 1209; *Herring* v. *Chesapeake & W. R. Co.*, 101 Va. 778, 45 S. E. 322; *Briddon* v. *Great Northern R. Co.*, 28 L. J. Exch. N. S. 51.

[39] *Texas & P. R. Co.* v. *Smissen*, 31 Tex. Civ. App. 549, 73 S. W. 42.

Circuit Court of Appeals for the Indian Territory,[40] but the Court, after announcing its inability to concur with the railroad company's contention, removed its mantle of solemnity to remark that, "had the dew been of that brand well known as 'Mountain Dew,' it might have affected the engineer and fireman, but not the engine or corporation itself to the extent of relieving it from the obligation of its contracts." For the benefit of lay readers and in justice to the Court, it might also be added that judicial notice is sometimes taken of the intoxicating qualities of "well-known" brands.

Proximate Cause.

In concluding, it should be said that in connection with the essential elements already emphasized, the loss which the act of God excuses must be the immediate and distinct result of the providential events alleged.[41]

George J. Couch.

KEEPING OF SAVAGE ANIMALS.

A recent case upon the liability of the owner of a savage animal has found its way from the Whitehaven County Court to the House of Lords. The action in the County Court was in respect of injuries occasioned to the plaintiff by a horse of the defendant. The defendant, a farmer, had put the horse into a field which he had occupied for fifteen years, and which adjoined a railway station. The field was divided from the footpath by a wire fence. For the purpose of making a short cut members of the public had for thirty years or more habitually crossed this field from a point on the footpath where they got over the fence to a gate near the station, and there was a trodden track from the point to the gate, which was usually unlocked, but occasionally kept

[40] *Missouri, K. & T. R. Co.* v. *Truskett*, 2 Ind. Terr. 633, 53 S. W. 444.

[41] *Tomkins* v. *The Duchess of Ulster*, Fed. Cas. No. 14087a; *The St. George*, 95 Fed. 172; *Sproul* v. *Kellar*, 4 Stew & P. 382; *Quincy Gas & Electric Co.* v. *Schmitt*, 123 Ill. App. 647; *New Brunswick S. B. & Canal Transp. Co.* v. *Tiers*, 24 N. J. L. 697, 64 Am. Dec. 394; *Merritt* v. *Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Elliott* v. *Rossell*, 10 Johns, 1, 6 Am. Dec. 306.

locked. The plaintiff was crossing by the track when he was attacked by the horse, and kicked and bitten. He had no leave from the defendant to cross. The horse had previously kicked and bitten other persons, and the County Court Judge found that the defendant knew this was the case, and that the horse was dangerous. The defendant had sometimes turned back people crossing, and shouted at them, and had complained to the police of persons so crossing as trespassers. He had been advised by the police to prosecute persons crossing, but had declined to do so on the ground that they were his customers for milk. At one time a notice board had been put up by defendant warning people not to trespass. It was argued for the defendant that the plaintiff being a trespasser, the action would not lie. The County Court Judge gave judgment for the plaintiff for £100 damages and made a note of his decision as follows:—"I find that this field has been habitually used by the public as a short cut, though they had no leave, and no doubt the defendant was a trespasser. I find as a fact defendant knew the horse had bitten other people. I think the defendant was guilty of negligence in putting a horse he knew to be dangerous into a field which he knew was habitually used by the public. The defendant was bound to keep safe a horse he knew to be ferocious; he did not do so and is liable." Subsequently, before notice of appeal was given, the Judge had added to the original note of his judgment the following words:—"On the question of trespass I came to no definite conclusion. The defendant only occupied for fifteen years. I had evidence of the use of the path for thirty or forty years. The defendant put up a notice fifteen years ago, but would not prosecute."

In the Divisional Court the case was dealt with on the assumption that the plaintiff was, by the finding of the County Court Judge, a trespasser. The Court (Darling and Pickford, JJ.), allowed the appeal and entered judgment for the defendant. The view of Darling, J., was that the plaintiff had no right to go into the field; he was, as the Judge found, a trespasser, and as to trespassers although there was a duty not to intentionally injure, there was no duty to take care. Pickford, J., agreed, considering that the plaintiff by wrongfully going into the field had brought the injury on

himself; and that the fact that the defendant knew that the public were in the habit of trespassing in the field made no difference. In the Court of Appeal the decision of the Divisional Court was upheld by Vaughan Williams and Kennedy, L.JJ., Buckley, L.J., dissenting. The majority of the Court held that the second entry of the County Court Judge "on the question of trespass I came to no definite conclusion" was inconsistent with the former note "no doubt the plaintiff was a trespasser, and it could not be looked at, inasmuch as it was an alteration made when the Judge was *functus officio*. Vaughan Williams, L.J., thought that the Judge meant by his original note that the plaintiff was a trespasser, and was not there by leave and license, and certainly not by invitation. On the assumption that the plaintiff was a trespasser, cases had been cited to shew that where a land-owner had allowed other persons habitually to come on his land without objection, it might be said that they came by what had been called "permission." He did not like the use of the word "permission," because it might bear the meaning of "leave and license," and he preferred to use the word "encouraged." It was not in his opinion correct to say that people were encouraged to come, because the defendant did not choose to exercise his full rights; he did in fact protest. People coming on the land under these circumstances took upon themselves the risk of what they might find on the land which they knew themselves to be wrongfully crossing. This was a pasture field; in such a field one would reasonably expect to find horses and cows, and possibly bulls; and it was only reasonable to expect that there might be in such a field a bad-tempered horse or bull. Where a person availed himself of the absence of objection on the part of an owner and was induced to trespass by the non-enforcement of that owner's strict rights, he had no cause to quarrel with the condition of the land, because the owner did not come forward and stop him. The people who crossed this pasture field must be held to have taken the risk of what they would find there; and there was no ground for saying that a person who suffered his field to be trespassed on as the defendant did, became subject to a duty which debarred him from using that field as such fields were ordinarily used, namely, by turning out therein a horse or a bull, although that particu-

lar animal might happen to have a bad temper. Kennedy, L.J., approved of the distinction drawn between what might be called "permission," "allowance" or "license," *e.g.*, absence of objection under circumstances implying intentional encouragement on the one hand, and cases on the other hand in which there had been merely tacit acquiescence short of such permission, allowance or license. Whether the case were treated as one of bare trespass or as one of tacit acquiescence without permission, the plaintiff failed, for the basis of liability was something in the nature of permission which might be called an encouragement or invitation to the plaintiff to come on the land. Buckley, L.J., read the explanation of the County Court Judge to mean that the plaintiff was not there as of right, but was not there in his own wrong otherwise than as one of the public who had to the defendant's knowledge habitually used the field as a short cut. To persons of that class the landowner owed this duty, that he should not wilfully expose them to something whose evil character he knew, but as to which he omitted to caution them. "The proposition of law, as I understand it," said the Lord Justice, "is that the donee must not look a gift horse in the mouth; if something is given, it must be enjoyed as it is given, and taken with its risks; but subject to this, that if the giver knows of some evil character in it at the time, and does not warn the donee, he is responsible, although it is a gift." He thought that the owner of a field which to his knowledge had been habitually used by the public as a short cut, whether they came there by express leave or not, owed a duty not to expose them to danger by putting into the field an animal which he knew to be dangerous.

The House of Lords has now reversed the decisions of the Court of Appeal, and restored the judgment given in the County Court (1911 A. C. 10). The reasons given by the Law Lords are based entirely upon what they conceive to be the effect of the Judge's finding, namely, that the appellant was in the field without express leave, but with the permission of the respondent, and so was entitled to recover. The Lord Chancellor thought that the case must be determined on the actual findings of the County Court Judge. It was true that there had been some question about what he decided; but the alteration made in his note

was quite legitimate, because the word he had used was capable of being misunderstood, and there was no objection to his explaining to the Court and to the parties the sense in which he had used it. Although not expressed according to the letter of legal phraseology, the view of the facts taken by the Judge amounted to this; he would not find whether there was a right of way or not—therefore the plaintiff did not establish that he had a right to be in the field. Again, he found that there was no express leave given to the plaintiff to be in the field; but the effect of his finding was that the plaintiff was there with the permission of the defendant, because he found that the field had been habitually used by the public as a short cut, and that the defendant was guilty of negligence in putting a horse which he knew to be dangerous into a field which he knew was habitually used by the public. In substance the finding was that the plaintiff was not there by right, but as one of the public who used the field to the knowledge of defendant; that the defendant did not take steps to prevent that user; and in those circumstances it was not lawful to let loose a horse which he knew to be dangerous without giving any warning of its dangerous character. Lord Halsbury concurred, and held that the finding raised the real proposition with which they were dealing, namely, whether or not a person who knew that the public were going over his ground habitually was entitled without warning or notice or any other precaution to put a dangerous beast where he knew it was probable that the beast would sooner or later do injury —not that he had given direct permission, but had declined to interfere and so acquiesced in their crossing it. If he had acquiesced in their doing so, he was bound to take the ordinary precautions to prevent persons going into a dangerous place where he knew they were going, and going by his acquiescence without notice or warning or any form of security to prevent the injury happening which did happen. Lords Atkinson and Shaw, of Dunfermline, delivered short judgments to the same effect.

Lord Loreburn, Lord Halsbury, and Lord Shaw, of Dunfermline, expressly declined to give any opinion on the law applicable to the case if the plaintiff had in fact been found to be a mere trespasser, as was assumed by Darling, J., or a trespasser *sub modo*, one of "the people who so come and

use his land knowing perfectly well that they have no right to be there, but assuming that, as a result of good nature or indolence on the part of the landowner, they will be able to do so without any proceedings being taken against them," in which category Vaughan Williams, L.J., placed him. As by the view adopted in the House of Lords the facts amounted to permission or acquiescence amounting to permission by the defendant of the plaintiff's use of the field, the interest in the decision from a legal point of view is greatly decreased. The opinion of Vaughan Williams, L.J., was that persons in the position in which he conceived the plaintiff to be (*i.e.*, not being there with permission, express or implied), took upon themselves not indeed the risk of finding a tiger, but of finding any danger there might be in the field if used in the way in which such a field was ordinarily used. That seems at least to be good sense, if it must not necessarily be assumed to be good law.

BRITISH CITIZENSHIP.

Persons of French or American nationality are commonly called French or American "citizens," persons of British nationality are called British "subjects." There is, however, no abstract substantive to express the status of being a subject, and the word "citizenship" is therefore used for the purpose. "Nationality" is sometimes used in the same sense, but it also connotes race-distinctions.

The question of the rights conferred by British citizenship is at this moment of pressing interest throughout the Empire. It has been brought forward chiefly by and on behalf of the inhabitants of British India, but the claim of coloured races (who are at the same time British subjects) to be treated as equal in all respects to the white races, solely because they are also British subjects, is giving rise to difficulties in nearly every part of the Empire. This claim has been met in a practical way by the enunciation of the political axiom that "the common rights of British citizenship cannot override the rights of self-protection conceded to oversea dominions." But it appears to be regarded as a grievance on the part of the coloured races that the oversea dominions should have the right to protect themselves by keeping out what are known as

undesirable emigrants, and British citizenship is thought to have conferred a sort of legal right to travel about the Empire, and enter any territory in the King's dominions without permission from the local territorial authorities. British citizenship of itself confers no such right, and if this were recognized frankly and fully by the coloured races—and, for the matter of that, by all British subjects—the notion that a judicial grievance is being suffered and a judicial hardship inflicted would probably soon disappear.

The notion that any British subject can go anywhere in the Empire without hindrance from any but Imperial authorities is, of course, either a possible survival from the time when there were no self-governing territories with legislatures of their own in the Empire, or else it is based upon the analogy of countries that still are perfectly unified and contain no quasi-subordinate Governments. The British Empire, however, as now constituted, is composite, and one right inalienably vested in the self-governing dominions is the right to say who shall and who shall not enter their territories. Another right vested in the self-governing dominions is the right to frame regulations (in the widest sense of the term) with respect to the rights and liabilities of all inhabitants (temporary or permanent) of their territories. Thus the oversea dominions that are self-governing (and it is only these that concern us) may legally and properly exclude or deport persons whom it is considered would be undesirable as inhabitants. In the same way the privilege of being naturalized as a British subject may be granted on any conditions or may be refused.

The peculiar structure of the Empire has brought about two results—one the direct result of the oversea dominions, powers of legislation being strictly territorial, and the other arising out of the necessity for framing a political conception of the relation between an inhabitant of an independent territory and the Government of that territory as distinguished from the Imperial Government.

Ordinarily, no legislation enacted by an oversea dominion has any effect outside its own territory. Consequently, with an exception to be noticed presently, where an oversea Legislature allows foreigners to become naturalized as British subjects in virtue of enactments passed for that purpose by the local Legislature, the privileges of naturalization are confined

to the territorial limits of the dominion. A foreigner naturalized in Canada remains a foreigner in Australia or in the United Kingdom. It is even thought by the Crown law officers that certificates under the English Act of 1870—the Naturalization Act, 1870—confer the status of a naturalized British subject in the United Kingdom only, and not in any oversea dominion. A circular dispatch to this effect was sent out by the Foreign Office in 1874. That the same person should be a subject of the King in one part of the dominions and not in another is an extraordinary anomaly which on every ground should be remedied. A short Act passed by the Imperial Parliament would be all that is necessary. That the anomaly and its inconvenience have already been noticed by the authorities is clear from the exceptional case in which naturalization overseas (or in the United Kingdom) is allowed to have some virtue in the other parts of the Empire. By sec. 1 of the Merchant Shipping Act, 1894, a ship, to be a British ship, must be owned by (*inter alia*) "persons naturalized by or in pursuance of an Act of Parliament of the United Kingdom, or by or in pursuance of an Act or Ordinance of the proper legislative authority in a British possession." If it were enacted that a person who was naturalized in one part of the dominions was to have the same rights of a naturalized British subject throughout the Empire, a very real grievance would be removed in favour of all persons who have obtained certificates of naturalization in one part of the Empire only.

The distinction between "natural-born" and "naturalized" subjects of the King ought, in fact, to be abrogated. The anomaly of this distinction between the two classes of His Majesty's subjects is the more marked because under the common law English nationality is a *jus soli* and not a *jus sanguinis*—the test is (with statutory exceptions) birth within the King's dominions. Section 7 of the Naturalization Act, 1870, and other statutes too, make it clear that there is still a distinction between natural-born and naturalized subjects. An instance of a legislative attempt to completely abrogate the distinction has occurred in New Zealand. The Native Rights Act, 1908 (replacing an Act of 1865), enacts that every Maori is to be "deemed to be a natural-born subject of His Majesty to all intents and purposes whatsoever." But this enactment would have no operation outside New Zealand, and, moreover, it seems clear that a Maori born within the

dominions is already a British subject, and that the Act will therefore confer no rights on him nor take away any he already has.

The second result of the composite structure of the Empire is that a new political conception is in course of evolution, primarily adapted to the case of persons who have by naturalization become British subjects within the limits of particular territories only, but a conception that seems likely to be of use in embracing all British subjects—natural-born and otherwise—who are permanently inhabitants of some particular territorial division of the Empire. The conception referred to is that of local citizenship combined with permanent residence in a particular part of the Empire, as distinguished from the citizenship of a British subject in the widest sense. This may be called the principle by which British subjects are classified according to their "usual residence," a principle near akin to domicil; it is based on the relation between the individual and the community in which he dwells, instead of the relation or tie of allegiance which binds every natural-born British subject of the King as representing the unified communities of the Empire.

The first hint of any judicial recognition of this principle of local citizenship and residence seems to be contained in a judgment of the Privy Council delivered by Lord Watson only eleven years ago (see *Union Colliery Company of British Columbia* v. *Bryden*, 81 L. T. Rep. 277; (1899) A. C. 580). Lord Watson, in referring to the status of naturalised Chinamen, said at p. 586: "Every alien when naturalised in Canada becomes *ipso facto*, a Canadian subject of the Queen; and his children are not aliens requiring to be naturalised, but are natural-born Canadians." In 1902 Lord Halsbury, when Lord Chancellor, said in another Canadian case—*Cunningham* v. *Tomey Homma* (87 L. T. Rep. 572, at p. 574; (1903) A. C. at p. 157): "The right of protection and the obligation of allegiance are necessarily involved in the nationality conferred by naturalisation; but the privileges attached to it, where these depend upon residence, are quite independent of nationality." Here "nationality" is used as a synonym of "citizenship." In 1906 and 1908 Lord Watson's phrase—Canadian subject of the Queen—was adopted in Australia, and judicial sanction given the expressions "Victorian subject of the King," "Australian-born subjects of the King": (see *Ah Sheeung* v. *Lindberg*, 1906, V. L. R., at p.

329; *Potter* v. *Minahan*, 7 Com. L. R. at p. 294). This local citizenship is sometimes styled "colonial nationality" (see, for instance, Piggott on Nationality, ii., 222) but the use of any such expression as "Australian nationality" has been deprecated in the High Court of Australia: (see *Attorney-General* v. *Ah Sheeung*, 1906, 4 Com. L. R. 951, where the Chief Justice said the Court was "not disposed to give any countenance to the novel doctrine that there is an Australian nationality as distinguished from a British nationality.") Nevertheless, it is clear that some kind of local or limited nationality of citizenship is conferred by naturalisation under statutes that only operate locally.

In the later case of *Potter* v. *Minahan* (*sup.*) the Chief Justice of Australia made "residence" rather than domicil or nationality, the test by which to determine whether "immigrant" included persons who are returning to an Australian home, and it was held that such persons are not immigrants, though even British subjects coming into Australia from other parts of the Empire might be immigrants. It is obvious that some such status, whether it be called "usual residence," "local citizenship," or "colonial nationality," must be attributed to the inhabitants of each territorial division of the Empire, in addition to the wider status of "British citizenship" possessed by those who are natural-born British subjects. What is really wanted in order to minimise the confusion of cross-divisions of the inhabitants of the Empire, is to abrogate the notion of a technical "domicil," and leave standing side by side with British nationality or "citizenship" something more like "residence." German law affords an excellent illustration of this arrangement, and we might well borrow the German term *wohnsitz*—which includes both domicil and residence—and take it over into English law as "usual residence." This would result in every natural-born British subject having a "British citizenship," and a Canadian, Australian, South African, &c., "citizenship," whilst a merely naturalised British subject would until his status is made equal to that of the natural-born have his Canadian, &c., "citizenship" only.

LAPSE OF OFFER.

The law as to the lapse, or revocation, of an offer, as, for instance, an offer to sell land, does not seem to be in a very satisfactory state. In Anson on Contracts, 11th edit., p. 35, the law is thus laid down: "The death of either party before acceptance causes an offer to lapse. An acceptance communicated to the *representatives* of the offeror cannot bind them. Nor can the representatives of a deceased offeree accept the offer on behalf of his estate." And that view seems to be supported in Pollock on Contracts, 7th edit., p. 39, on the ground that death makes the proposed agreement impossible by removing one of the persons whose consent would make it; although as pointed out by that learned author, the Indian Contract Act makes the knowledge of the other party before acceptance a condition of the proposal being revoked by the proposer's death. In the case of agency, the death of the principal puts an end to the agent's authority without regard to the time when it became known to the agent or to third parties. In the Laws of England (by the Earl of Halsbury), vol. 7, p. 347, the law is thus stated: "An offer is determined by the lapse of the time during which it is to remain open; by the death or insanity of the person by whom it was made if the fact of his death or insanity *comes to the knowledge* of the person to whom the offer was made *before* he has accepted it," and reference is made to *Dickenson* v. *Dodds* (34 L. T. Rep. 607; 2 Ch. Div. 463, C. A., per Mellish, L.J., at p. 475). We do not, however, so read the judgment. The learned Lord Justice said: "It is admitted law that if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when once the person to whom the offer was made knows that the property has been sold to someone else it is too late for him to accept the offer." That was not a case of death as will appear from the following short statement of the facts: On the 10th June, 1874, the defendant Dodds signed and delivered to the plaintiff a memorandum which, so far as material, was as follows: "I hereby agree to sell to Mr. George Dickson

the whole of the dwelling-house, garden ground, stabling, and outbuildings thereto belonging situate at Croft belonging to me for the sum of £800.—As witness my hand this 10th day of June, 1874—(Signed) JOHN DODDS. P.S.—This offer to be left over until Friday, 9 o'clock a.m., J. D. (the twelfth) 12th June, 1874—(Signed) J. DODDS." On the Thursday afternoon the plaintiff was told by a Mr. Berry that Dodds had been offering or agreeing to sell the property to Allan, the other defendant. Thereupon the plaintiff at about 7.30 in the evening, left at the house of Mrs. Burgess, the mother-in-law of Dodds, where he was then staying a written acceptance of the offer to sell the property, but according to her evidence, that document never reached Dodds as she had forgotten to give it to him. On the following Friday morning an agent of Dickinson handed Dodds a duplicate of the acceptance by Dickinson. Dodds replied that it was too late, as he had sold the property. A few minutes later Dickenson himself handed Dodds another duplicate of the notice of acceptance, but he declined to receive it, saying: "You are too late; I have sold the property." Dodds had in fact on Thursday, the 11th June, signed a formal contract to sell the property to the defendant Allan. Held, by the Court of Appeal, that under the circumstances the sale to Allan was an effectual withdrawal of the offer. That decision brings us to the consideration or revocation of an offer as distinct from lapse. It is stated in the headnote of that case, "*Semble*, that the sale of the property to a third person would of itself amount to a withdrawal of the offer even although the person to whom the offer was first made had no knowledge of the sale;" but it was not necessary to decide that point. And in *Byrne* v. *Van Trenhoven* (5 C. P. Div. 344) it was decided by Lord Lindley (then Mr. Justice Lindley) that an offer sent by letter cannot be withdrawn by merely posting a subsequent letter which does not in the ordinary course of the post arrive until after the first letter has been received and answered. As observed by the learned Judge, if the defendant's (the offeror's) contention were to prevail, no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. Again in the case of *Henthorn* v. *Fraser* (66 L. T. Rep. 439; (1892) 2 Ch. 97, C. A.) it was decided, and must, it is submitted, be taken as settled

law that a revocation of an offer is of no effect until brought to the mind of the person to whom the offer was made, and that therefore a revocation sent by post does not operate from the time of posting it. The case of *Dickinson* v. *Dodds* was referred to, but was distinguished on the ground that in that case the person to whom the offer was made knew of the sale before he sent his acceptance. In this connection it may be mentioned that it was decided by the House of Lords in *Dunlop* v. *Higgins* (1 H. L. Cas. 381) that where an offer has been made through the medium of the post, the contract is complete as soon as the acceptance of the offer is posted; and this is so even though the accepting letter never reached the offeror; (see *Household Fire and Carriage Accident Insurance Company Limited* v. *Grant*, 41 L. T. Rep. 298; 4 Ex. Div. 216, C. A.) For further information on the subject see the learned text books before referred to.

NOTES OF CASES.

INDORSEMENT OF SERVICE.—The decision of the English Court of Appeal in *Hamp-Adams* v. *Hall*, calls attention to the fact that one, at least, of the Rules—that relating to indorsement of service—is fundamental, and no waiver will cure its non-observance. According to Ord. 9, r. 15, the person serving a writ of summons, must within three days at most after the service, indorse the date of service, "otherwise the plaintiff shall not be at liberty, in case of non-appearance, to proceed by default;" and the affidavit of service must mention the day on which the indorsement was made. In the present case the action was for assault and there was no appearance. Judgment was obtained by default and the damages were assessed at £1,500 in the Sheriff's Court where also the defendant did not appear. Apparently he first discovered the result from the newspapers. After some intermediate applications attacking the verdict, he applied to Bucknill, J., at Chambers to quash the proceedings on the ground of non-compliance with the above rule. The plaintiff on the 23rd November, 1910, had obtained an order for substituted service by registered letter addressed to the defendant at his club. Service was affected in this manner, on the 24th of November, but the process server did not make

the necessary indorsement until the 30th. Apparently Bucknill, J., considered that this non-compliance with the rule had been waived, for he declines to stay the proceedings; but the Court of Appeal have held that it was not an irregularity which could be waived. The result of the omission was to render the writ void, so that the subsequent proceedings were wholly irregular. It is possible that on the particular facts of the case the defendant had been taken by surprise, and the decision would have been more satisfactory if it had proceeded on the particular facts. But as a matter of principle it is not clear why an irregularity of this kind should not, like other irregularities, be subject to waiver in a case where the defendant takes steps in the proceedings with knowledge, or the means of knowledge, that it has occurred.

EXTRADITION WITHOUT REQUISITION.—Recently a King's Bench Court had to consider the validity of an extradition warrant which had been granted after a requisition for the arrest of the prisoner had been received from the French diplomatic representative, but before depositions properly sworn in France before the magistrate who issued the French warrant had been sent over (*Rex* v. *Governor of Brixton Prison, ex parte Thompson.*) The Court there dismissed the application for a habeas corpus on the ground that the objections were purely technical, and did not affect the jurisdiction of the magistrate. Recently the Privy Council went much further in excusing compliance with formalities for extradition in the appeal of *The Attorney-General for the Dominion of Canada* v. *Fedorenko.* The appeal was brought from an order of the King's Bench Court of Montreal granting a writ of *habeas corpus* on account of a Russian subject who had been committed for extradition on a charge of murder in Russia. The order for committal had been made by the Chief Justice under the Canadian Extradition Act, which differs considerably in its operation from the English Extradition Acts. The latter have no operation except as to foreign States, with which we have extradition treaties or arrangements; the Canadian statute, on the other hand, applies so far as it is not inconsistent with anything in a special arrangement with a foreign country. The Canadian arrangement with Russia provides that on a requisition from the diplomatic representatives, accompanied

by a warrant and depositions of evidence which would be sufficient in the place where the arrest is made, the fugitive shall be handed over; while the Act makes no mention of a requisition. The Court in Canada had held the order for extradition in this case to be invalid on the ground that no requisition had been received from Russia at the time, and that, therefore, the terms of the arrangement were not fulfilled and the procedure under the Act did not apply. The Judicial Committee, however, allowed the appeal, holding that the terms of the arrangement were supplementary to, and not exclusive of, the procedure under the Act. In their view while extradition was obligatory when the provisions of the arrangement were satisfied, it was optional in other cases; some weight, it seems, was attached to the argument that if no arrest could be made till a requisition was received, the fugitive would often be able to escape over the frontier. In English law, when the terms of a treaty differ from those of the statutes, the treaty prevails (*Rex* v. *Wilson*, 1878). Doubtless that doctrine does not apply to the Canadian statute; but it seems a pity that there should be so much flexibility in the procedure of extradition when the liberty of the subject is directly in issue. And this is the more regrettable where, as in this case, there was a grave question whether the murder charged against the prisoner was not a political crime, though that point, apparently, was not taken before the Privy Council.

It is interesting to note that on the Committee which heard the appeal in this Canadian extradition case was Lord de Villiers, the Chief Justice of the Supreme Court of the Union of South Africa, who was created an English peer last year. He is entitled to sit under the Judicial Committee Amendment Act, which makes the Judges of the Supreme Courts of the self-governing Dominions who are Privy Councillors, members of the Committee. While the proposal made by New Zealand at the Imperial Conference that there should be one representative of each self-governing Dominion on the Committee, was deemed impracticable for the present, the summoning whenever possible of a distinguished Colonial Judge, such as Lord de Villiers, is only a fitting honour, which, when it is more generally applied, will make the Court more efficient and more acceptable. Lord de Villiers, being a peer, who is a member of the Judicial Committee, has, moreover, the right to take part in the hearing

of British appeals in the House of Lords, the office of a member of the Judicial Committee of the Privy Council being, by virtue of the Appellate Jurisdiction Act, 1887, a "high judicial office," within the meaning of the Act of 1876. It is to be hoped that the Government, whose representatives indicated at the Imperial Conference, their intention of making the composition of the two supreme appellate tribunals identical, will proceed without delay to effect this most desirable change. In the meantime it would be both a useful and interesting thing if Lord de Villiers were to exercise his right to sit in the House of Lords, as well as on the Judicial Committee, for by thus personifying the connection which already exists between the two tribunals, he would demonstrate the desirability of making it more generally intimate.

RAILWAY CARRIAGES AND DERELICT NEWSPAPERS.—Americans have recently amused themselves by discussing a question as to the ownership of newspapers purchased by passengers in railway carriages, and after perusal deliberately thrown aside and abandoned. Do these newspapers become the property of the railway company, or may they be gathered up and appropriated by a fellow passenger, at any time before the company by some overt act has reduced them into its possession? The value of the newspapers and periodicals, which are from time to time thrown aside in this fashion is considerable, and there can be no doubt that they are usually collected by the company, acting by their servants. And it has been laid down in the case of *South Staffordshire Water Co.* v. *Sharman* (1896, 2 Q. B. 44), that where a person has possession of a house or land with a manifest intention to exercise control over it and the things which may be upon or in it, then if something is found in that land or house, whether by a servant or a stranger, the presumption is that the possession of that thing is in the owner of the *locus in quo*. But there is much difficulty in applying this *dictum* to the owner of a railway carriage: the case would rather appear to be covered by the observations of Blackstone as to the appropriation and abandonment of property, "property in movables originally acquired by the first taker remains in him by the principles of universal law till such time as he does some other act, which shews an intention to abandon it, for then it becomes, naturally speak-

ing, *publici juris* once more, and is liable to be again appropriated by the next occupant. So if one is possessed of a jewel, and casts it into the sea, or on a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use." It would appear, therefore, that the law favours the vigilant, and that the passenger who watches his opportunity and is the first to lay hands upon a rejected newspaper acquired a good title to it as against the owners of the carriage and the guards and ticket collectors, who are their representatives.

ACTION AGAINST RAILWAY COMPANY FOR DELAY IN THE DELIVERY OF WEARING APPAREL.—Many persons in this country who have travelled by railway in holiday seasons must have had experience of delay in the delivery of their luggage, and of having been compelled to pass one or more evenings after their arrival at their destinations in clothing unsuited to the surrounding circumstances. These disappointments are more or less vexatious, but would not, we think, be generally considered to warrant a claim for damages, to be enforced, if necessary, by action. We read, however, that in a recent case in Louisiana, a bride, to whom a fashionable milliner had failed to deliver her trousseau on her wedding day, according to her contract, was held to be entitled to recover damages, not only for her disappointment in not having her dresses in time for the wedding, and her mortification in having to go to her husband unprovided with suitable clothes, but also for what she had lost in entertainments, which had been planned for her by her friends, and which she had to forego for want of proper gowns. It is true that the law does not concern itself about trifles, and that it is easy to ridicule a claim founded on the discomfort arising from the delay in the delivery to a passenger by railway, of dress clothes and the ordinary requisites of a traveller. But the difficulty in putting a money value upon the inconvenience sustained by the passenger, is not necessarily an answer to his claim, though it may be argued that to award damages in such a case is, without any express provision, to award a penalty to the party aggrieved.

RIGHT OF VENDOR TO FORFEITED DEPOSIT.—The case of *Jackson* v. *de Kadich* (1904, W. N. 168), is one of those cases which, not intended to be reported at length, give

some trouble by getting into the text-books and thence into other reported cases. Farwell, J., declined to make an order that the vendor was entitled to retain the deposit as well as to rescind the contract. The case is criticized in Williams' Vendor and Purchaser, p. 952, on the ground that the learned Judge was mistaken as to the facts before the Court of Appeal in *Howe* v. *Smith* (27 Ch. D. 89). In other text-books, however, *Jackson* v. *de Kadich* is cited, without any such illuminating comment, and it seems to have been relied on, in at least, one reported case: see *Griffith* v. *Vazey* (1906, 1 Ch. 796). It is often important for the vendor to obtain a formal declaration that he is entitled to retain the deposit on recission of the contract, because, as in *Jackson* v. *de Kadich*, the deposit may be in the hands of a stakeholder, and the latter may not feel justified in handing it over to the vendor, without the order of the Court authorising him to do so. This point is referred by Mr. Williams, at p. 951, of his book, in this way: "it is submitted that the vendor is equally entitled to the deposit, on rescinding the contract for the purchaser's breach of renunciation of it, when the deposit has been paid to a stakeholder without special provision for its application." This statement is not justified, and the inconvenience caused by *Jackson* v. *de Kadich* abated, by a recent decision of Neville, J.—*Jones* v. *Burnell*, 16th June. There the vendor after judgment for specific performance and purchaser's failure to comply, obtained an order to the effect that the contract was rescinded and that the vendor was entitled to the deposit, which was in the hands of a stakeholder. Apparently, the right of the vendor to a declaration that the deposit is forfeited has hitherto been held to be an alternative to his right to have the contract rescinded, *Jones* v. *Burnell* decides that these rights are not alternative, but cumulative.

PATENT RIGHTS AND RESTRICTIVE CONDITIONS.—The judgment of the Privy Council in the case of *National Phonograph Co.* v. *Menck* (1911, A. C. 336), constitutes an important contribution to the patent law on one of its most practical sides. The case came on appeal from Australia, but the five members of the Judicial Committee, who heard it, are all Lords of Appeal, so that—even if not technically binding in England—the judgment delivered by Lord Shaw

represents the considered views of the House of Lords in its judicial capacity. But, dealing as it does, with patent rights under an Act not differing essentially from the Patents and Designs Act, 1907, the judgment is likely to be accepted in the English Courts as authoritative, should the same point arise here for decision. Shortly, what is decided is that a patentee is entitled to restrain the purchaser of a patented article from using it or dealing with it in a manner contrary to the conditions imposed by the patentee when selling it, even though there be no contractual relation between the patentee and the purchaser, provided that the purchaser had these conditions brought home to his mind when purchasing the article. The ground of this right to insist on the observance of restrictive conditions is not based on contract, but springs from the property conferred by the patent grant, and, is therefore, analogous to the right of enforcing restrictive conditions against the purchaser of land with notice of their existence. In the present case the appellants sold their patented goods only to persons who entered into stringent agreements with them. One of the terms which all these agreements contained, was that the articles should not be sold below certain prices. Another was that they were not to be sold to dealers who were not on the patentee's lists, and that persons removed from the patentee's lists should not traffic in the patentee's goods at all. The respondent had been removed from the appellants' (patentees') list of dealers, and he knew of the restrictions. It was held that he was not entitled to purchase and traffic in the patent articles, irrespectively of any contractual relationship between him and the patentees. Several attempts have been made in recent years to impose conditions—usually as to the retail price of sale—on all purchasers of certain articles, such as tobacco in packets, &c. These attempts have failed in the case of unpatented articles, whenever there was no express contract entered into by the purchaser with the person imposing the condition. Sometimes, also, the attempt failed in the case of patented articles, where the proceedings were not taken by the patentee. But the right of the patentee to insist on the observance of restrictive conditions at the hands of every purchaser who acquires the patented good with knowledge of those conditions is clearly laid down in the judgment of the Privy Council. The law on this point, as stated in *Incandescent Gas Light Co.* v. *Cantelo,* by

Wills, J., (12 Rep. Pat. Cas. 262), has not been authoritatively approved of. Among cases in the ordinary reports, *British Mutoscope and Biograph Co.* v. *Homer* (1901, 1 Ch. 671), may also be referred to as laying down the distinction between the general right of ownership of ordinary chattels and the restricted right of ownership of patented articles. The distinction as there laid down has now been approved by the Privy Council.

CONVERSION OF CHATTELS.—The latest case of market overt—*Clayton* v. *Le Roy et Fils* has had a curious result in the English Court of Appeal. A watch, originally bought from the defendants by the plaintiff's wife for £100 in 1902, was stolen from the plaintiff in 1908, and pledged. In 1909 it was sold, with other unredeemed pledges, at the city auction rooms in the city of London, for £28, and subsequently it was purchased by Bennett for £44. Bennett sent it to the defendants for examination, and they having heard of its loss, informed him that it had been stolen. Bennett expressed his willingness to give it up upon being paid the price for it, and the defendants wrote to the plaintiff's wife to this effect. The plaintiff issued a writ and later in the same day made, through his solicitor, a formal demand for the watch, and on its being refused, the writ was served. The defence was sale in market overt, but Scrutton, J., decided against defendants on this point. By the custom of the city of London, the rule as to market overt extends to open shops where goods of the kind in question are usually dealt in. But the learned Judge held that the auction rooms were not such a shop. There was the further defence that there had been no conversion of the watch before the issue of the writ, and on this point, also, he was against the defendants, and he gave judgment for the return of the watch, or for its value. The Court of Appeal have, by a majority (Moulton and Farwell, L.JJ., Vaughan Williams, L.J., diss.), reversed the judgment on the latter point, so that it has been unnecessary to give a decision as to the correctness of the judgment of Scrutton, J., on the former, though substantially it appears to have been accepted as correct. But the majority have held that the defendants' letter, which amounted practically to an intimation that they were holding the watch pending consideration of Bennett's claim, was not such a definite interference with the plaintiff's right

of property as to constitute a conversion. "I am never very confident," said Lord Bramwell in *National Mercantile Bank* v. *Rymill* (44 L. T. 767), "as to what is or is not conversion;" and the present decision justifies this hesitating frame of mind. *Prima facie* any detention of the goods from the true owner is a conversion, but this is not universal; for instance, a finder of goods may take a reasonable time to inquire whether a claimant is entitled: *Hollins* v. *Fowler* (L. R. 7 H. L., p. 766); and upon a similar principle the majority of the Court of Appeal appear to have proceeded in the present case. There was no conversion before the issue of the writ, though apparently there was a conversion immediately afterwards. As to the fact of conversion it is possible that opinions will differ. The defendants do not seem to have suggested that it was necessary for them to make inquiries as to the plaintiff's title, and the arguments in favour of conversion are strong. But it is unfortunate that such a subtlety should render the action abortive.

ACCORD AND SATISFACTION. — The curious minded who are interested in discovering the extent of the ingenuity of the judicial mind, should read the judgment of Lord Justice Vaughan Williams, in the case of *Punamchand Shricand & Co.* v. *Temple* (27 T. L. R. 430). The defendant had given the plaintiffs a promissory note for 1,500 rupees. They applied for payment to his father, who sent his cheque for 650 rupees, saying that he sent it "in full settlement" The plaintiffs, without making any reply, took the cheque, credited the defendant with 650 rupees and then sued him for the balance. Now it is settled law that a payment of a smaller sum cannot be a sufficient consideration for the release of a larger sum due by a debtor, unless the release is under seal; but if the creditor accepts something other than money in satisfaction of his claim—for example, a horse, a bill of exchange, a third party's cheque indorsed by the debtor—then the "accord and satisfaction" is sufficient consideration to support waiver by the creditor of his claim to the balance: *Goddard* v. *O'Brien* (9 Q. B. D. 40), *Bidder* v. *Bridges* (37 Ch. D. 406). But, of course, such consideration must come from the debtor, otherwise it does not affect his liability to pay; for "accord and satisfaction," is the discharge of the old contract by the creation of a new one — namely, the "accord," and this new contract is subject to the ordinary

rule that the consideration in a contract must move from the promisee, not from some outside party. Accordingly, Mr. Justice Scrutton rightly held that the father's payment could not be pleaded by the son as an "accord and satisfaction" of his debt, and he gave judgment for the plaintiff. This view the Court of Appeal were obliged to uphold as sound; but they were obviously convinced that it would be inequitable to let the plaintiffs recover their balance because of such technicality in the rules which govern the validity of a "consideration." Accordingly they set out to discover a defence to the action.

Two ingenious ones occurred to the mind of the learned Lord Justice, whose name we have just mentioned. First, he suggested that the receipt of the father's cheque by the plaintiffs and their silence about it amounted to an implied agreement on their part to cancel the defendant's signature to the promissory note. In equity an action would lie to compel them to so cancel it. They must, therefore, be regarded as having cancelled it. But it is elementary law that no one can sue upon a cancelled bill of exchange; hence their action was unsustainable. This is very ingenious, but we know of no authority for the extraordinary doctrine of equity suggested by it, and the learned Judge did not profess to quote any. Secondly, he suggested a still more ingenious argument—which the reader should consult at full length in the report; we can only summarize here its main purport. This argument suggested that the acceptance of the cheque sent "in full settlement," made the creditors a trustee for the father of their rights against the son, and operated as an equitable verbal assignment of the chose in action to him. They could not, therefore, sue without his assent, or, if they did, any defence, which the debtor could set up against him would be available against them. But the father's relationship to his son would be a good defence against him if he sued his son on the promissory note assigned (supposititiously) to him. Therefore it would be a good defence against the creditor suing as trustee for the father: Again, no authorities were quoted by the learned Lord Justice in support of these novel equities.

THE CRITERION OF POSSESSION IN FACT.—Great as are the merits of English law, and profound as is its practical common sense, there is one point in which it is admittedly

rather weak, and that is the reasoned definition of general terms. Few matters so often are essential to the decision of a case as the precise legal criterion of possession as a fact, and yet it cannot be said that any judgment anywhere reported, contains a luminous or satisfactory exposition of it. Mr. Justice Joyce has just had before him a simple, but interesting and important point, which will explain what we mean: *Kynoch (Limited)* v. *Rowlands.* Here the owner of certain premises had a strip of land, of which he had no use, but which had been legally decided to belong to him some fifteen years before. Since then a neighbour had constantly used the waste ground to throw his rubbish upon and for other purposes of a temporary nature, ancillary to the enjoyment of his own property, which abutted on the land. He set up the case that these trespasses, never interfered with and continued as of right for over twelve years, were acts of possession or ownership, which made him a squatter during those years, and now at the end of the period of limitation the legal owner of the land. The learned Judge held that such trespasses did not amount to dispossession of the legal owner, so that his legal ownership left him still the actual possessor of the land. But the difficulty which the learned Judge felt was to find some satisfactory criterion by which trespasses, which amount to taking possession of the land can be distinguished from those which do not. The general rule has been laid down, in terms generally accepted as correct, by the authors of Pollock and Wright on Possession: "When the object as a whole is incapable of manual control, and the question is merely, who has *de facto* possession, all that a claimant can do is to shew that he, or someone through whom he claims, has been dealing with the object as an occupying owner might be expected to deal with it, and that no one else has done so." Unfortunately, however, this definition is somewhat vague, since it is almost as difficult to define the acts of ownership, which might be expected of an occupying owner as it is to define "possession." In practice, the Courts have held that the character of the land must be looked to, and that acts, which would not amount to an indication of ownership in one case may do so in another. Hence in the case of uncultivated land, shooting over it has been held sufficient: *Harper* v. *Charlesworth* (1825, 4 Barn. & Cress. 574, 584). In the case of foreshore, the habitual taking of sand and gravel is generally

accepted as an important mark of ownership: *Hale, de Jure Maris,* ch. 6: *Moore's Foreshore,* p. 394: *Calmady* v. *Rowe,* (1844, 7 C. B. 861). On the other hand, it is no act of ownership to let one's trees overhang or fall upon the disputed land: *Lemon* v. *Webb* (895, A. C. 6). And, of course, in all cases the acts set up must be exclusive—as to which some doubt arose in the present case. Perhaps the most satisfactory criterion that can be suggested is that the acts relied upon must be unequivocal indications of a claim to occupy the land: if they are equally consistent with a claim to have a profit or an easement or a license over it, or if they are common trespasses of a kind usually tolerated by neighbours, they cannot amount to a claim of possession.

CURRENT COMMENT.

THE SAVARKAR CASE.—A feeling of considerable relief may be expressed that the Arbitration Court at the Hague is not yet enthroned as the absolute tyrant of nations. In the nature of things, the decrees of a limited number of fallible men cannot replace the general current of public opinion as providing a law for the world. The very people who are most prone to clamour for the erection of a compulsory Court which shall supersede all wars by its judgments, are those who are most likely to be staggered by the Savarkar decision. But there were not a few far-seeing pacifists, both in Europe and America who had, months ago, realized this danger. The specious proposals of Mr. Knox for the establishment of a Universal Court were seen to amount to premature Federation. Such a Court might easily be the powerful engine of absolutism and of *etatist* tyranny. The danger was realized: the Savarkar decision demonstrates its imminence.

The two latest decisions of the Hague Tribunal appear to us profoundly unsatisfactory. In the Newfoundland Fisheries case, the Tribunal took from the United States what it is quite obvious the American negotiators of the old treaties thought they had secured:—a definite easement or *profit-a-prendre.* They restored it to the States, in effect, in the form of an irritating and uncertain restriction on the "reasonableness" of Newfoundland legislation. How utterly unworkable

this vague restriction was, is proved (if proof were necessary) by the fact that Great Britain and the United States have with one accord thrown over the neutral Dutch Commission which was to decide what was proper in the circumstances for them; and have arranged to settle that detail for themselves. And now comes the Savarkar case. Prof. Lammarsch (Austria) was here succeeded as chairman by Mr. Beernaert (Belgium), and Mr. Gram (Norway) succeeded Dr. Drago (Argentina), but the Earl of Desart and Baron de Savornin-Lohman retained their places; so did M. Renault, who seems to be fast coming to occupy the position once attributed by an active journalist to the German Emperor—that of "Chief Justice of Europe." It may perhaps be supposed that Baron de Savornin-Lohman was the British nominee on both occasions. If so, Mr. Gram must have been the choice of France, unless Mr. Clunet is right in assuming that each name was mutually acceptable. Baron Alex. de Savornin-Lohman is one of the foremost jurists of the Netherlands. The most prominent part of his long and honourable career has been spent as Professor of Constitutional and Criminal Law at the "Free" University of Amsterdam. He has for many years been a pillar of the Conservative party in one or other branch of the Netherlands Legislature, and was in the Cabinet of 1890-1. He enjoys a great reputation as a publicist, but his achievements in the field of International law seem to be limited to his having acted as arbitrator in recent years on four occasions. The first of these was the case between Mexico and the United States; the second that between France and Britain concerning the Muscat dhows; and the third and fourth, the Newfoundland Fisheries and the Savarkar cases. In early life, Baron de Savornin-Lohman (who was born at Groningen in 1839) had considerable experience as a local Judge, resigning membership of the Appeal Court at Bois-le-Duc in 1884 to take up his Amsterdam chair. Baron de Savornin-Lohman is not a member of the Institute of International Law. A favourite constitutional apothegm of his may be quoted—"And now abide Wisdom, Justice and Freedom, these three: but the greatest of these is Freedom." He is a high authority on the religious difficulty in education.

Mr. Gram has been an Associate of the Institute of International Law since 1898. He has had considerable

international experience—first, as Swedish Judge of the mixed Courts in Egypt (1875-1882), and afterwards as Norwegian resident at Stockholm, and arbitrator in the Behring Sea case (1893). He was a Minister of State from 1893 to 1898.

Let us now examine the Savarkar award. We have heard no lawyer in this country approve it. It amounts to the proposition that any violation of territory is permissible if it is exercised in the supposed interests of society and obtains the countenance of a policeman. There was a clear infraction of French sovereignty when the accused, escaping to French soil, was dragged from it by British agents. But it was not done against the will of the French Government: it knew of Savarkar's transit through its waters and had not objected. And its "brigadier"—who was not, we assume, a field officer—assisted in the capture! We have only to contrast these circumstances with those which attended the successful escape of the Polish exiles to British soil in 1840 (see L. M. & R., November, 1910, page 88), to be painfully struck by the little grasp which the Hague Court evinces of the great principle of Territorial Sovereignty. One cannot but feel that the French case was put forward without enthusiasm. It is an open secret that it was only owing to the Socialist party, that any reclamations were made at all. We have no sympathy with Socialism, or with Savarkar. But we are sure that it will not do to weaken the territorial principle.

Importance seems to have been attached to the fact that the British and French police authorities were in communication regarding Savarkar, and that the Prefect of the district was instructed by the French Minister to take the necessary measures to prevent revolutionary Hindus living in France from attempting a rescue. The London police were, in fact, informed that the necessary instructions were being given to guard against any "incident" during the presence of Savarkar at Marseilles. Britain might perhaps have had a ground of complaint if, after these officious undertakings, sympathizers of Savarkar had been allowed to approach the ship in which he was being conveyed; or if in any similar manner his escape had been facilitated. But no undertaking was ever given or suggested, that France would deliver him up if in fact he did escape. As a fact, the men who affected the arrest chased Savarkar for a quarter-of-a-

mile: and this action and the subsequent expulsion went far beyond the assurances given.

Stress, again, seems to be laid on the good faith and absence of consciousness of any illegality on the part of the captors. But if we establish that people can do what they like on the strength of their good intentions, we pave an easy causeway to intolerable anarchy. The accused was in fact removed from the soil of France by a subordinate employe at the request and with the assistance of foreigners. If that is not a violation of French sovereignty, it is difficult to know what is. Let us again refer to the case of Peter Martin (68 State Papers, p. 1223). Here was a desperado who was being conveyed for trial in British Columbia across the soil of Alaska. One can hardly imagine that the Alaska police did not countenance and implicitly support that transaction, and in fact, a letter was written to them inviting their assistance (Lovell to Joscelyn, *ibid.*, p. 1225), so that they clearly had notice. Yet the United States demanded and obtained his restoration to freedom. "No one," says the *Times*, "supposes that the Court was unanimous" in the Savarkar case. It cannot be called a very valuable precedent, and we repeat that it is satisfactory that the projected World Court is not yet riveted upon us.—*The Law Magazine.*

THE RETIREMENT OF SIR ARTHUR WILSON.—The retirement, now authoritatively announced, of Sir Arthur Wilson, K.C.I.E., deprives the Judicial Committee of the Privy Council of a member of great experience in Indian cases. After his call to the Bar in 1862, he was for some time reporter for the Law Reports of cases in the Court for Crown Cases Reserved, and was a frequent contributor to the columns of legal journals, for one of which, in 1873, he wrote a series of articles on the then proposed fusion of law and equity, which attracted much attention and were subsequently republished. In November of the same year, he was selected as one of the three counsel, who framed the Rules of Court under the Judicature Act, and he subsequently published an edition of the Judicature Acts, which had great vogue in its day. He acquired a considerable practice at the bar, and gained a high reputation for knowledge of commercial law and grasp of legal principle. In 1878, he was offered and

accepted the post of a *puisne* Judge of the High Court of Judicature at Calcutta, on the resignation of Mr. James Markby. He filled this post for many years, we believe, with general satisfaction. After his return to England he was appointed legal adviser to the India Office, and was made a K. C. I. E., and was subsequently made a Privy Councillor, and took his seat as a paid member of the Judicial Committee.

CORPORATIONS PRACTISING LAW.—The lawyers' Associations in New York and Baltimore have been recently considering the question as to whether there shall not be legislation preventing corporations from practising law. Of course, a corporation as such cannot become an attorney, but a corporation may require that certain actions prosecuted or defended by individuals interested in companies as stockholders or as insured, etc., shall be turned over to the company, whose counsel will look after them. At the annual dinner of the New York County Lawyers' Association, on March 28th, a member stated that he had investigated seventeen cases of indemnity companies whose policies provide that the insured must turn over to the insuring company the conduct of his defence in case of litigation. These cases, he said, were only an example of many instances where corporations were not only practising law, but were practising in a manner which would be sufficient to disbar an individual so practising. At a meeting of the Baltimore Bar Association on March 7th, a committee of five was appointed to report upon "the legislation necessary to properly supervise, regulate, and control bodies corporate acting in legal and fiduciary capacities in this State, and to regulate their fees, commissions, and other charges, as well as limit their legal powers." One of the speakers said: "This association is face to face with an important situation. I have been informed that seventy per cent. of the members of this Bar are not making a livelihood. I do not believe eighty per cent. of the 1,500 or 1,800 members are making $100 a month. Corporations doing our business are working not only to our detriment, but will also ultimately inflict tremendous injury upon the general public. Slowly, but with persistence, the corporations are pushing the lawyers to the wall. They advertise, solicit, and by their corporate influence and wealth monop-

olize the legal field." The same matter is to be brought to the attention of the Denver Bar Association. Thus far there has been little open complaint in New Jersey, although the tendency of putting the settlement of estates, and certain other business into the hands of trust companies, has had its effect in taking away business from lawyers, who are not the attorneys of these companies, and there are probably some other grounds for complaint, especially in the large cities, although we suspect they are yet slight. How the matter is to be reached, however, is another question.

LAWYERS' FEES IN GERMANY. — Lawyers in Germany cannot advertise, and their fees are fixed by law, according to Dr. Hermann Haeussler, rechtsanwalt, of Berlin, Germany. A rechtsanwalt is an attorney-at-law and counsellor combined.

"The German law fixes the exact fees which a German attorney has to claim for all kinds of professional work, and the rechtsanwalt can charge neither more nor less. These fees are fixed whether the cases are criminal or come under the civil code. The amount depends exclusively on the value of the object of contention or the character of the crime. It is an old, though still unfulfilled, wish of German lawyers to have a new fixed list of fees, not made after the old law standard of the year 1878, but with consideration to the changes—numerous and decided — which have taken place since that year.

"The rechtsanwalt can never be a business man, as may the lawyer in the United States. The practice of the law is not considered a calling or profession, but is essentially a public office.

"According to the code of 1878, a lawyer is charged with certain public duties. He is obliged to have his residence in the town or district whence appointed. Further, he must conduct himself in and out of office in a manner befitting his professional and social standing—a duty devolving upon his rank. A lawyer is forbidden to advertise in newspapers, by canvassing, etc., or to buy or take over a practice already made, as being unworthy of his calling.

"His position in society is between that of officials and scholars," said Dr. Haeussler, "and through custom and law

he is compelled to keep the position to the last degree. This compulsion to keep one's rank has given rise to the existence of committees, called anwaltskammern, whose duty it is to scrutinize the conduct of the members of the profession. These committees have a strict code of punishment, which includes the power to disbar or expel a lawyer from his calling."

"In this way the lawyers in Germany have a good and honoured position. In fact, there is scarcely a country in which the lawyer enjoys more respect and confidence."

THE LATE JUDGE BACON.—A story used to be told in Lincoln's Inn that Sir James Bacon, who completed his eightieth year before his son was made a County Court Judge, was urged by some of his friends to retire from the Bench. "See," he replied, "I have my son, Francis, at the Bar, and I have to provide for him." Francis Bacon's appointment came, and his future was assured, but still the Vice-Chancellor stayed on. Another representation was made to him, that there could now be no reason why he lingered on the judicial stage. "See," said they, "your son, Francis, has been made a Judge." "Yes," was the old Vice-Chancellor's reply, "and it has made me so glad. It has taken such a great load off my mind that I feel ten years younger."

Throughout the whole of his long career on the Bench—he was the senior Judge at the time of his death—Judge Bacon sat at Bloomsbury and at Whitechapel, and the cases that came before him at these two Courts——the dressmaking disputes at Bloomsbury and the curious altercations of some of the alien litigants at Whitechapel—kept him prominently before the public. With his characteristics as a Judge we deal more particularly in our County Court column. It is sufficient to say here that his principal qualification for the office he held for thirty-two years was his knowledge of the world, which he never attempted to conceal by a mock assumption of judicial ignorance. His ready wit and linguistic attainments were other gifts, which assisted him in no small measure to discharge his judicial duties. Here are some of the epigrammatic sayings with which he was wont to relieve the routine of his work: "Interpreters are persons who translate a language they do not understand into one they cannot

speak." "The truth will out, even in the witness box." "I never feign judicial ignorance; I never appear to be more simple than I am." "Sorrow, limiting festivity, should facilitate payment"—this to a debtor who pleaded a family bereavement as an excuse for delay in payment. Many of his good sayings were occasioned by the conduct and exclamations of lady litigants. One woman, in a declamatory moment, said: "If I hear such stories I shall fall down," whereupon Judge Bacon remarked: "If it affected me in that way I should spend all my time on the floor." A widow of the name of Jones was being sued by a firm of monumental masons for the cost of a memorial she had ordered them to place upon her husband's grave. As obstinate as she was voluble, she resisted every reasonable attempt to effect a compromise. "Woman," exclaimed Judge Bacon, after a strong outburst of ill-temper from the widow, "I perceive the late Mr. Jones is at rest!" He was usually at his wittiest in trying actions for the recovery of money due for clothing. On one occasion when a defendant, beside himself with wrath, tore off first coat and then waistcoat, shouting as he did so, "The coat does not fit; the waistcoat is absurd, "His Honour quietly asked, "What about the trousers?" The roar of laughter that followed restored even the witness's good temper.

THE CENTENARY OF THE FRENCH BAR.—It seems rather strange that in so old a country as France, the centenary of its Bar should have been celebrated. But the old French Ordre des Avocats was abolished by the Constituent Assembly in 1790, and after a lapse of twenty years was reinstituted by Napoleon on the 14th December, 1810. It was the centenary of the latter event that has just been celebrated in Paris, with great pomp and ceremony. The proceedings opened with a reception of the provincial and foreign representatives at the Palais de Justice, delegates coming from places as widely distant as Montreal and Constantinople. The Bar of the United States does not seem to have been represented, but among the English delegates were two barristers, known on this side of the Atlantic: R. B. D. Acland, K.C., Recorder of Oxford and Judge Advocate of the Fleet, and W. English Harrison, K.C., chairman of the General Council of the Bar. At the opening conference, Maitre

Busson-Billault, the *Batonnier,* presided, and, in the course of a lengthy address, sketched the origin and history of the illustrious Order of Advocates. A reference to lady barristers was warmly applauded. "In Rome, as in Greece," he said, "The Bar was a profession for men, but the historians relate that in Rome two generously endowed women, Amasia and Hortensia, proved to be admirable barristers. According to Valerius Maximus, however, one Phrasia scandalized the Judges by her bad character and her violence, and they were compelled to forbid her to speak in public." The next evening a banquet was held in the Salle des Pas-Perdus at the Palais de Justice. President Fallieres and several ministers were present, and the guests, including the foreign representatives and fifteen lady barristers, numbered 1,300. M. Busson-Billault, proposing the toast of the provincial and foreign visitors, recalled the opening of the Palais de Justice and the many historical scenes that its walls had witnessed. M. Girard, the Minister of Justice, then spoke of the excellent relations existing between the magistracy and the Bar. "Some of the nations here represented," he said, "may have benefited by the example of our Civil Code, but all have themselves put forth fruitful efforts. Their methods represent a considerable advance which we should not ignore, for a perfect knowledge of the laws of other countries cannot but facilitate international agreements." The President of the French Republic, who was warmly applauded on rising to speak, paid a tribute to the legal profession, and extended a warm welcome to the provincial and foreign representatives. In addition to the official functions, numerous private entertainments were given to the visitors from other countries by distinguished members of the Paris bar.

Maitre Decoxi, thus described the conditions under which the Order of Advocates was suppressed and then re-established.

The origin of the order dates back from time immemorial. Juvenal says that after the Roman Conquest the natural taste of the Gauls for eloquence soon led to the creation of a body of professional advocates who found fame and fortune within easy reach. In the thirteenth century the first attempts were made at a system of regulation. Barristers were required to swear that they would only take up just causes; their fees, proportionate to the importance of their cases, and being fixed by the Judges, were never to exceed the then equivalent of £27, and an ordinance of the year 1277 restricted the length of speeches, forbidding repetition and allowing the advocate only to supplement what his *confrères* had said if he had something really essential to add. Philip the Hardy was the author of this ordinance.

The history of the French Bar is interwoven with the history of Parliament. In the most ancient times, in fact, Parliament was recruited from the bar, and the most eminent magistrates—DeThou, Séguier, Pasquier—had first been famous barristers. When the Parliaments were exiled, advocates closed their chambers, and when the magistrates were recalled the advocates returned in triumph with them. In their pursuit of equality by the abolition of all privileged corporations the Constituent Assembly did not overlook the bar. The order was suppressed, and every citizen who had made the necessary studies was allowed to follow the profession "without having to account for his conduct to any but the law." Although some illustrious advocates—Tronchet, Duport, Treillard—were in the Assembly they dare not, or would not, protest. There was one, however, who possessed the courage to attack the project—Robespierre—but his counsel was disregarded, and the Order of Advocates was abolished by the laws of the 16th August and the 2nd September, 1790.

About a hundred advocates, however, while accepting the new designation *hommes de loi*, founded a free society which preserved the customs and discipline of happier days. They dissociated themselves from the new comers, who were often without capacity and not infrequently without morals.

A regrettable failing, however, was shewn in certain quarters. Selected by Louis XVI. to defend him, Target declined on the ground of his age and weariness, and Tronchet only accepted the task with bad grace. But, indignant at these unlooked-for defections, many advocates spontaneously offered to defend the unhappy monarch. Berryer *père* relates in his Souvenirs that Tronson-Ducoudray assembled a large number of *confrères* at dinner one day. It was then resolved to form a defensive league. If the choice of the King fell on any one of them, all would lend their aid. Even the line of defence and the exordium were decided on. Leading counsel for the defence was to say, in substance: "*J 'apporte à la Convention la vérité et ma tete. Elle pourra disposer de ma vie quand elle aura entendu mes paroles.*" But, as it turned out, none of those resolute advocates were called. Tronchet and the venerable Lamoignon de Malesherbes, whose spontaneous and generous offer the King accepted, asked for the aid of a third counsel. The King designated De Sèze, who acquiesced without hesitation and read his pleading before the convention.

Little was needed in those days for a man to be sent before the Revolutionary Tribunal. Malesherbes carried his head to the scaffold, and Tronchet and De Sèze only owed their salvation to flight. Yet these happenings failed to intimidate the advocates of that day. Tronson-Ducoudray defended Marie Antoinette, and Chauveau-Legarde Madame Elisabeth, the Girondins, and Charlotte Corday.

But the defences made by these advocates soon became intolerable to the Tribunal of Blood, and a law of the 11th June, 1794, reorganized the Revolutionary Tribunal in such manner that henceforth there would be but one sentence—death. "No more advocates!" said art. 16. "Calumniated patriots will be defended by patriotic juries; conspirators will have no advocates for the defence."

Napoleon, when First Consul, undertook to raise up a new society on the ruins of the old. Having drafted the regulations of general administration, he occupied himself with the reorganization of the judiciary. The tribunals and the law colleges were successively established. The First Book of the Civil Code was promulgated, soon to be followed by the Code of Commerce, the Code of Criminal Investigation, and, finally, the Penal Code. At length came laws for the recognition and protection of advocates, but at this juncture the order was not yet re-established. Subsequently Cambacérès submitted a project to Napoleon involving this concession. But the Emperor, although he held consultative advocates and jurisconsults in high esteem, professed disdain for pleaders, and he scribbled at the foot of the project this comment: "These proposals are absurd, and leave no room for action against advocates, who are the artisans of crime and treason. I will never sign such a decree as long as I have the

sword at my side. I wish we could cut out the tongue of any advocate who uses it against the Government."

However, the project was amended, and on the 14th December, 1810, appeared the decree re-establishing the Order of Advocates "as one of the means calculated to maintain probity, tact, disinterestedness, desire for conciliation, love of truth and justice, and enlightened zeal for the weak and oppressed."

MEDICAL ELECTRICITY.—In *Young* v. *Town of Gravenhurst* (1910), 22 O. L. R. 291, the defendant maintained an electric light plant with wires carrying a primary current of about 2,200 volts. Other wires running from a transformer carried a secondary current of 110 volts and supplied the house of the plaintiff. By a curious set of circumstances, combining with the defendant's negligence, the primary wires got into communication with the secondary wires. "The stage was then all set for a tragedy," said the Court. The plaintiff, eleven years old, lying in his bed about seven a.m., in March, with the light which hung over his bed for reading purposes turned on, noticed a sparkling, which indicated, as he thought, that the lamp was going out; he then took hold of the oscillating lamp with his left hand, and knew no more till some time after. The iron bedstead was in contact with a radiator, the latter being in contact electrically with the earth. The boy's left hand had to be amputated, and his skull was burned through to the brain in two places. Experts for the defence testified that the injuries were, in their opinion, caused by a low-tension current of 110 volts—and that all over this continent persons using electric light live in constant danger of suffering such injuries. All that is needed, they said, is to place the body in contact with a radiator or a water pipe, and put the hand to an unprotected lamp shoulder, and the mischief may be done. "This I do not believe," said Mr. Justice Riddell. They were contradicted by electrical experts called for the plaintiff, "whose evidence I believe," said the Judge. A physician testified that the lad's heart was beating full and regularly immediately after the shock, but his breathing had been temporarily suspended, and that high-tension currents (when they do not kill) arrest the breathing, but do not stop the heart. The Judge quoted from Tousey's Medical Electricity, published in 1910: "High-tension currents cause death by

respiratory paralysis, low-tension currents by cardiac paralysis, if they cause death at all;" and from H. Lewis Jones, Medical Electricity, published in 1894: "Strange to say, the effect of currents in arresting the heart is more evident with small than with large currents. . . . In cases of accident from contact with high-pressure conductors, and when large currents have traversed the patient's body, the heart beat may not be arrested, but there may be a profound inhibition of the respiratory centre."

Judgment for $7,500 in favour of the boy, and $2,250 his mother for expenses of surgical operations, etc.

As to the expert opinion evidence in the foregoing Canadian case, "this I do not believe," said the Court. A mild exclamation in view of the imbecilities, eccentricities, perjuries, and miscellaneous enormities, so frequently appearing in expert testimony. But does not the testimony thus discredited by the Judge enable us, in Shakespeare's phrase, to "gather honey from the weed, and make a moral of the devil himself" It was decisively overcome by the declarations of experts in their published works, in connection with a fact furnished by the lad's physician. Moral: A professional man's opinion expressed in a standard treatise, written by him for the instruction, not only of the public, but of other members of his profession, is entitled to more weight than the opinions of professional men of no greater experience or ability that are sold to litigants for consumption by laymen on the bench or in the jury box. Take Darwin's famous proposition in his "Descent of Man:" "Our ancestor was a hairy quadruped furnished with a tail and pointed ears, probably arboreal in his habits." Surely, a biologist testifying in Court, if he were of kin to an alienist of the "brainstorm" cult and receiving a fee of $1,000 or more, would not hestitate to affirm that man descended from anthropoid apes; that Darwin spoke with superfluous caution; and that Alfred Russell Wallace's statement in his recently published "World of Life," that at least twenty "missing links" are needed, instead of one, is not understandable.

Referring to expert testimony, "Thank th' Lord whin th' case is all over, the jury'll pitch th' testimony out iv th' window," said Mr. Dooley ("On Peace and in War").

"I know that it has been said by a distinguished Judge 'that illustration is not argument,' but at times it is at

least a very convenient substitute for it," observed Judge (now Chief Judge) Cullen in *Skinner v. Norman*, 165 N. Y. 565, 571, 59 N. E. Rep. 309, 310. A tip-top "near" argument by means of a hypothetical case appears in the Canadian case discussed in the foregoing paragraphs. Judge Riddell there remarked that much may be said for the view that a corporation undertaking to furnish electricity of a voltage of 110 must, at all hazards, keep from the buildings supplied, and from the wires intended to carry only 110 volts, their electricity of a higher voltage. "It may be," he continued, "that a corporation which contracts to deliver a tiger cub into a cage on certain premises is bound to see to it that a full-grown tiger of theirs is not delivered in its place."—*Law Notes*.

THE RECALL OF JUDGES. — Some of the States have adopted constitutional provisions for the recall of executive and legislative officers; but it has remained for Arizona, which wants to become a State, to include it its proposed constitution, now before Congress, a provision for the recall of Judges. Section 1 of Article VIII. of the proposed constitution reads as follows.

"Every public officer in the State of Arizona, holding an elective office, either by election or appointment, is subject to recall from such office by the qualified electors of the electoral district from which candidates are elected to such office. Such electoral district may include the whole State. Such number of said electors as shall equal twenty-five per centum of the number of votes cast at the last preceding general election for all of the candidates for the office held by such officer, may by petition, which shall be known as a Recall Petition, demand his recall."

In the election which is to follow the filing of the recall petition, the incumbent of the office may be a candidate, if he desires; and other candidates may be nominated, and the candidate who receives a plurality of votes is to be declared elected. It is provided by the Judiciary Article (Art. VI.) that Judges of the Supreme Court are to be elected by the whole State for terms of six years, and Judges of the Superior Court by counties for terms of four years.

We need not stop to consider the special features of Article VIII. of the proposed constitution, because, in our judgment, the recall provision, as applied to judicial officers, is essentially subversive of the fundamental conceptions un-

derlying the proper exercise of the judicial functions. The Judge is, to be sure, a public servant. But at the same time he is not called upon to respond to the popular opinion of the moment, as are members of the legislative body, and as, to a lesser degree, is the executive. It is the duty of a Judge to enforce what Mr. Justice Hughes has aptly characterized as "the fundamental will of the people,"—that is, the deliberate judgment of the people as embodied in the constitution and the laws. Now, everyone will recognize that the public sentiment of the moment may be hostile to the enforcement of some particular law or constitutional provision; that even a majority of the voters may be opposed to it, and that, rather than abide by it until it can be amended, they would like to see the Courts disregard it, and enforce as law whatever whim may be uppermost in the popular mind. Even a decision which is intrinsically just and right, as well as in accord with the law, may not be acceptable to the popular mood, especially when the people are inflamed by demagogic appeals against wealth and property rights. Yet we all know that it is the duty of a Judge to be deaf to popular clamor, however loud, or however considerable the proportion of citizens from whom it comes, and to determine the case before him strictly according to the provisions of law. It is clearly the duty of a Judge, if need be, to sustain the constitutional and legal rights of one individual as against the whole community or the whole State. There are doubtless great numbers among the Judges in America who would do this even though it might cost them their offices. But there are many who, conscientiously or otherwise, would listen to the popular voice and be guided by it, if such a system as is proposed for Arizona were to be put into operation; and certainly if a Judge should be recalled from office by reason of a just and right decision, the effect upon the integrity of the judiciary would be disastrous. It needs no argument to shew that the people *en masse* are not in a position to judge properly as to the merits of any particular case. They must generally lack both accurate knowledge of the facts and the necessary understanding of the principles of law; and even considerations of abstract justice are likely to be forgotten in times of public excitement.

History shews us that there have been two kinds of tyranny, the tyranny of the autocrat or of a ruling class, and the tyranny of the mob. Of the two the latter is by far the

worse. Marat and Robespierre were creatures of the mob, and the atrocities perpetrated under their rule far exceeded those of the later Bourbons, bad as conditions were in their times. It was in the administration of "justice," that the tyranny of these revolutionary leaders was most obnoxious. Even in recent times the notorious Dreyfus case furnishes an example of judicial subserviency to popular prejudice, the injustice twice done by the Military Courts having been happily overruled by the Court of Cassation. In our own country, on the other hand, we still refer with admiration to the conduct of Marshall in according to Aaron Burr, when on trial for treason, every right to which the law entitled him, despite the high current of popular feeling against him.

The founders of the American republic, by committing the exercise of the functions of government to responsible officers elected by the people, or chosen by those so elected, and by the distribution of powers into the three branches of government, steered a safe course between the Scylla of autocracy and the Charybdis of "mobocracy"— as Dr. Lyman Abbott has characterized it. They were notably successful in their undertaking to establish "a government of laws and not of men." The tendency of the recall provision in the proposed Arizona constitution is towards a government of men and not of laws; for it will be possible thereunder to remove a Judge from office because he enforces the law. We see no theory upon which either party in Congress can approve this provision, consistently with its declared principles; and, in our opinion, the rejection of the proposed constitution on this ground would be a wholesome rebuke to intemperate radicalism despite the fact that it might be ineffective to prevent Arizona from having a recall provision applicable to Judges, if her people really want it,—for one could be inserted by amendment as soon as the State government should be established. If, however, it seems wise to Congress and to the President to let the extreme radicals have their lesson now, as to how this sort of thing will work, we can only hope that it will be a lesson which will be remembered for all time.—*Bench and Bar.*

LAW SCHOOLS AND STANDARDS OF GENERAL EDUCATION. —The report of the United States Bureau of Education for

1910 shews a considerable increase in the number of students in American law schools. But it also shews that legal education still lags behind medical education. Half of the medical schools of the country require one or two years in college for admission; the medical course covers four years and a large percentage of medical graduates take a post-graduate course of a year or two in a hospital. With the exception of a dozen law schools of universites—and the law school of the University of Missouri is one of these twelve—the highest standard of admission is a high school course, and while the medical schools almost without exception require four years of attendance, one-quarter of the law schools require only two years for a degree, and two, only one year. This, the report says, explains why there was a decrease of 5,555 in medical students in these schools from 1904 to 1910, and an increase of 5,261 in the law schools. The law schools which have courses of only one year or two years express much dissatisfaction with the requirement, but state that it is impossible for them to require longer courses while the door of admission to the bar itself is wide open. In those States which have established state boards of law examiners there is no difficulty in requiring full courses in law, but in States which still adhere to the method of examinations in open Court or by a special committee for individual applicants law schools are powerless to raise the standard of legal education.

Beginning with the school year 1911-12, the entrance requirements in Western Reserve University, Franklin T. Backus School of Law, will be the degree of A. B. or B. S. University of Minnesota College of Law, two years of college work; University of Missouri School of Law, two years of college work; University of California, Hastings College of Law, one year of college work; University of Illinois College of law, one year of college work; University of Kentucky College of Law, one year of college work; Cornell University College of Law (for three years' course), one year of college work; University of Nebraska College of Law, one year of college work. Beginning with the school year 1912-13, the entrance requirements in University of California, Hastings College of Law, will be two years of college work; University of Colorado department of law, Colorado Law School, two years of college work; University of Denver Law School, one year college work; University of Kansas School of Law, one year of college work; University of Michigan department of

law, one year of college work. Since 1897 Harvard Law School has required an academic degree for admission.

LAW SCHOOLS AND LEGAL AID.—The University of Denver school of law, Colorado, has a department denominated a Legal Aid Dispensary. Work in it by the students is compulsory. Meritorious cases of persons who are unable to pay the fee ordinarily charged by attorneys are taken, and, under the direction of an experienced attorney and with the advice of members of the faculty, the students of the second and third year classes conduct the litigation. An Act of the General Assembly of the State of Colorado (chap. 183, 1909) permits students when acting for the dispensary, to appear in all Courts of the State to the same extent as if admitted to the bar, and the volume of business now in the dispensary is great enough to afford each student an opportunity frequently to represent clients in the Courts. In the School of Law of Northwestern University, Chicago, twenty students of the first, second, or third year classes are to be assigned for practical office and trial work as assistants in the Chicago Legal Aid Society, university branch. The number of hours of work from each student is to be determined by agreement with the superintendent of the society.

POLICEMEN HAVE RIGHTS.—One dark night a policeman, while patrolling his beat, noticed a door partly open. After summoning a fellow policeman, he pushed open the door, stepped through the doorway into the unlighted and dark interior, and was suddenly precipitated to the bottom of an unguarded freight elevator shaft. He died from the injuries received. His widow, alleging negligence in not having the shaft properly guarded as provided for by statute, brought suit to recover damages. Defendant contended that it owed no duty to a policeman. The Court of Appeals of New York in *Racine* v. *Morris*, 94 Northwestern Reporter, 864, holds that, as policemen are required at all times of the day and night to protect the rights of persons and property, intestate was lawfully in the building in discharge of his duties: and, since the statute in question was enacted for the protection of

all persons lawfully upon the premises of another, the duty imposed by the statute to guard elevator shafts was for intestate's benefit, and defendant was liable for failure to comply therewith.

ETIQUETTE IS FATAL.—Etiquette, we know, is prescribed for, and required by, good breeding, to be observed in social or official life; but since the case of *State* v. *Flanakin*, 54 Southern Reporter, 940, we are left in doubt as to the propriety of conventional decorum with a jury. Defendant was tried for murder, and the polite jury brought in a verdict reading as follows: "We, your jury, beg leave to return a verdict of manslaughter." Defendant filed a motion in arrest of judgment on the ground that the jury had failed to find him guilty or not guilty, and had brought in no verdict which would afford a sufficient basis for exception. The motion being denied, an appeal was taken. The supreme Court of Louisiana holds that the motion should have been sustained. The Court says: "The jury was expected by its verdict to answer the question, 'Is the accused guilty or not guilty?' and it has not answered it." The result might have been different had the Judge been equally polite, and answered their "beg leave to" with a kind, "Yes, sirs: you may," and then received the verdict.

SHORT WILLS.—Apropos of Mr. Harriman's short, simple will, it is of interest to note that Lord Mansfield found half a sheet of note paper ample for the disposal of his wordly possessions. Sir James Fitzjames Stephen's will began and ended in thirteen words. A dozen lines served to dispose of Lord Russell of Killowen's estate of nearly £150,000, while Lord Brampton, of the Court of Exchequer, the brother of Anthony Hope, disposed of his estate of nearly £142,000 in 400 words.

LAWYERS' INCOMES IN NEW YORK. — The income of the average New York lawyer is no greater than that of a patrolman or a tradesman's clerk, according to figures compiled by

the New York County Lawyers' Association. A report prepared for the association shews that there are approximately 16,000 lawyers in Greater New York, or about one to every 275 inhabitants. This provides, it is estimated, an average of three or four clients to each lawyer.

Forty per cent. of all the New York lawyers are having a struggle for existence, the report says, and only thirty per cent. are making "a fair living." About ten per cent. are making "large profits" out of their profession. It is this ten per cent. and their "large profits" that "tempts" the young man with ambition.

THACKERAY AND THE LAW.

In the one-hundredth anniversary of Thackeray's birth, which was celebrated recently, the legal profession has a special interest, for, like so many other famous men of letters, the author of "Pendennis" was a member of the Bar. The Benchers of the Middle Temple—where he was called in 1848—have already celebrated Thackeray's connection with their Inn by a banquet at which some unreported speeches in his memory were delivered, a mistaken idea of so memorable an occasion having led them to regard the function as a private one. For all real lovers of the Temple the Thackeray centenary has a much wider interest than that which the Benchers of his Inn were pleased to attach to it. The law itself never had any attraction for him. He entered the chambers of Mr. Taprell at No. 1 Hare Court in 1831 to "read hard for the Bar" and promptly discovered that he had no liking for the kind of training that was obtainable under a special pleader. "This lawyer's preparatory education," he wrote, "is certainly one of the most cold-blooded, prejudiced pieces of invention that ever a man was slave to. . . . A fellow should properly do and think of nothing else than Law. . . . The sun won't shine into Taprell's chambers, and the high stools don't blossom and bring forth buds." This notion that the law is a jealous mistress, that she requires the undivided attention of her followers, is emphasized by Thackeray in his sketch of Mr. Paley in the famous chapter in "Pendennis," called "The Knights of the Temple," in which he compares the

studious habits of that learned gentleman with the Bohemian ways of George Warrington:—

> How differently employed Mr. Paley had been! He has not been throwing himself away: he has only been bringing a great intellect laboriously down to the comprehension of a mean subject, and in his fierce grasp of that, resolutely excluding from his mind all higher thoughts, all better things, all the wisdom of philosophers and historians, all the thoughts of poets, all wit, fancy, reflection, art, love, truth altogether—so that he may master that enormous legend of the law, which he proposes to gain his livelihood by expounding. Warrington and Paley had been competitors for university honours in former days, and had run each other hard; and everybody said now that the former was wasting his time and energies, whilst all people praised Paley for his industry. There may be doubts, however, as to which was using his time best. The one could afford time to think, and the other never could. The one could have sympathies and do kindnesses; and the other must needs be always selfish. He could not cultivate a friendship or do a charity, or admire a work of genius, or kindle at the sight of beauty or the sound of a sweet song—he had no time, and no eyes for anything but his law-books. All was dark outside his reading lamp.

Thackeray, who abandoned his intention of following the Bar within a few months of entering those dull chambers in Hare Court, deemed it advisable, however, some seventeen years later, to renew his acquaintance with the "dusty purlieus of the law." He was encouraged by Monckton Milnes to entertain the idea of becoming, like Fielding, a London magistrate. How the project came to nothing is explained by a letter he wrote to Monckton Milnes a few months after he joined the Bar at the Middle Temple in 1848: "You are a good and lovable adviser and M.P., but I cannot get the magistrate's place, not being eligible. I was only called to the Bar last year, and they require barristers of seven years' standing. Time will qualify me, however, and I hope to be able to last six years in the literary world; for though I shall write, I dare say, very badly, yet the public won't find it out for some time, and I shall live upon my past reputation. It is a pity, to be sure. If I could get a place and rest I think I could do something better than I have done, and leave a good and lasting book behind me; but Fate is overruling." Fate was never more kind, for, although "Vanity Fair" had recently been completed when Thackeray penned these lines to his influential friend, "Pendennis" and "Esmond" had yet to be written, and probably they never would have been begun if Thackeray had been provided with a regular income. Before time had qualified him for a London magistracy, Fame had destroyed the need or desire for it. For a while, however, he occupied chambers

at 10 Crown Office Row, and his name, with that address, appeared in the "Law List" from 1849 to 1851. Subsequently, when he no longer entertained the ambition to become a Metropolitan magistrate, his name adorned the door-post of No. 2 Brick Court, where Goldsmith's lively friends were wont to disturb the learned labours of Blackstone. A commemorative tablet already marks Goldsmith's residence at No. 2 Brick Court, and the Benchers of the Middle Temple would do a pleasing thing were they to place there a similar tablet to commemorate Thackeray's association with it.

Unlike Dickens—also a member of the Middle Temple but never called to the Bar—Thackeray makes none of the principal figures in his books practising members of the legal profession. Arthur Pendennis's connection with the Bar was not more intimate than his own, and nearly all the *habitués* of the Inns whom he sketches have little or no concern with legal work. In one of his ballads there is an attractive picture of attorneys—

> A-livin' at their ease,
> A-sending of their writs abowt,
> And droring in the fees.

But very few solicitors are to be met with in his novels, Mr. Bond in "Philip" being, perhaps, the most agreeable of the slightly sketched attorneys who are to be found in his pages. Thackeray appears, indeed, to have had no great liking for law or for lawyers. But no writer, not even Lamb or Dickens, had a finer veneration for the Inns, or has given a more delightful description of life in the Temple:—

> Those venerable inns which have the Lamb and Flag and the Winged Horse for their ensigns have attractions for persons who inhabit them and a share of rough comforts and freedom which men always remember with pleasure. I don't know whether the student of law permits himself the refreshment of enthusiasm or indulges in poetical reminiscences as he passes by historical chambers and says, "Yonder Eldon lived; upon this site Coke mused upon Lyttelton; here Chitty toiled; here Barnewall and Alderson joined in their famous labours; here Byles composed his great work upon bills, and Smith compiled his immortal leading cases; here Gustavus still toils, with Solomon to aid him;" but the man of letters can't but love the place which has been inhabited by so many of his brethren or peopled by their creations as real to us at this day as the authors whose children they were—and Sir Roger de Coverley walking in the Temple garden and discoursing with Mr. Spectator about the beauties in hoops and patches who are sauntering over the grass, is just as lively a figure to me as old Samuel Johnson rolling through the fog with a Scotch gentleman at his heels on their way to Dr. Goldsmith's chambers in Brick Court; or Harry Fielding, with inked ruffles and a wet towel round his head, dashing off articles at midnight for the Covent Garden Journal, while the printer's boy is asleep in the passage.

Some things have changed in the Temple since Thackeray's days, but the description of the Hall of the "Upper Temple" in "Pendennis" still holds good:—"With the exception of some trifling improvements and anachronisms which have been introduced into the practice there, a man may sit down and fancy that he joins in a meal of the seventeenth century. The Bar have their messes, the students their tables apart; the benchers sit at the high table on the raised platform, surrounded by pictures of Judges of the law and portraits of royal personages who have honoured its festivities with their presence and patronage." Thackeray was too much of the literary man to concern himself with questions of law reform, though no doubt his vivid descriptions of the "sponging houses" into which Rawdon Crawley, with many another of his creations, was thrown assisted to bring about a necessary reform in the law relating to debtors. His essay in *Fraser*, "On Going to See a Man Hanged," in which he gave a faithful account of the repulsive scenes at the execution of Courvoisier, helped, too, to create the public feeling of resentment, which was ultimately expressed in the abolition of public executions. It was as a literary man that Thackeray looked at all things legal, and, although the members of the Bar are justly proud that he, too, was a member of their profession, yet it is because of the imperishable words in which he has preserved the more picturesque side of life in the Inns that they have a special reason for revering his memory.

THE LIGHT SIDE OF THE LAW.

The Elusive Boy.

There is an impression about that the law is powerless in the presence of the small boy—that he shares with kings, ambassadors, and trade union officials an immunity from those legal processes which constrain the footsteps of ordinary citizens to the paths of rectitude. So far from this being the case, it is probable that the boy—"the soaring, human boy," as the unctuous imagination of Mr. Chadband depicted him—might, if he troubled himself at all on the subject, demonstrate that he is peculiarly the object of the law's solicitude and attention. There is an increasing

tendency on the part of the State to pose towards him as a combination of fairy godmother and Dutch uncle, by which popular, but mystifying, expression is intended to be implied a gruff, restraining, admonishing, quasi-parental sort of attitude.

The civil Courts, it is true, will have nothing to do with infants—at all events as defendants. It is no good suing them for money lent or the price of goods, or for damages for trespass, or negligence, or assault. But in the criminal Courts responsibility begins early in life. Up to the age of seven you are immune; you may comport yourself as desperately as you please without fear of consequences. From that age, however, up to the age of fourteen, during which period you answer the legal definition of "a child," you are punishable for your offences, if the magistrate is satisfied by evidence that you realized at the time what a naughty boy you were being. From fourteen to sixteen, when in the eyes of the law you are a "young person," you are fully responsible unless your friends can satisfy the magistrate that you are mentally defective. After that age you can stand your trial and take your punishment alongside criminals of any age.

So, you see, responsibility begins early in life, and in the old, harsh days of the penal laws, when extenuating circumstances did not count and First Offenders Acts were unknown, terrible things might happen to boys. It is not a hundred and fifty years ago since five boys were hanged together in London for stealing. "I never saw boys cry so," is the terse, but illuminating, comment of the historian who witnessed the horrifying event.

Broadly speaking, therefore, it may be assumed that, from the age of fourteen upwards, that which is a punishable offence on the part of a man is likewise a punishable offence on the part of a boy, the only difference being that while in the case of an adult punishments take the forms of fines or detentions, there is an increasing tendency to consider that for boys the most salutary treatment is birching. As regards corporal punishment, it is curious to note that public opinion tends steadily towards the view that it is brutalizing and degrading for adults, but appropriate and serviceable for youths. There may be sound, ethical reasons for the distinction, but, naturally, it is not one which boys will regard with any degree of enthusiasm.

How, in these, more merciful days, can a boy declare that the law is peculiarly on his track? Well, it vaccinates him, keeps him at school, birches him, combs his hair for him—this is meant literally; we need not be more explicit—and provides special Courts for him where his offences are dealt with summarily and without the limelight which should attend the misdeeds of heroes. It provides uncongenial supervisory schools, and can drive him there even when his term of probation is expired. It hauls him out of public-houses, and even searches his trousers pockets in public places on reasonable suspicion of cigarettes. That would not have done for Tom Sawyer! And it is galling for youths of spirit, properly imbued with the Dick Turpin tradition. All very well, perhaps, from a grown-up public standpoint, but very handicapping for an active-limbed boy whose opportunities for romance and adventure must be timed between the hour of school-closing and supper, and whose area for the same is restricted to a vigilantly policed urban district.

It may be desirable to mention a few of the statutory offences to which boys are peculiarly prone, and for which magisterial punishment is provided. You can be convicted for beating and abusing animals, for throwing or casting fireworks in the street, for giving false alarms of fire, for trespassing in pursuit of game or rabbits, for fishing in private waters, and for stealing fruit. All of these meet with fines or small terms of imprisonment, and in the case of boys there is generally a provision for the substitution of a dose of birch rod. It is expressly provided that where a child is male the Court may, in addition to or instead of any other punishment, adjudge the child to be privately whipped. "In addition to"—mark that; and you must admit that there would be some justification if a small boy were to complain that the law is over-attentive to him.

Why, then, is it that we hear complaints that the law is not competent to deal with boys? Partly because of the nature of their offences, and partly because of the strategic elusiveness of the criminal. Boys do not murder, or burgle, or forge, or blackmail. They rob orchards, deface property, pelt cats, assault one another, and break by-laws dealing with street noises and stone-throwing, all offences of a light-hearted, unpremeditated and transitory description. And the mobility of the youthful criminal and his disregard for appearances cannot be matched by the grown-up citizen. These

offences are all punishable. Don't blame the law. The magistrate is sitting there ready to deal out an appropriate measure of reformatory and birch rod. The policeman is willing, to the full extent of his wide-girthed, short-breathed, tight-tunicked ability, to assist in the apprehension of the criminal. But the offender slips round the corner and remains anonymous. The difficulty for the outraged householder is the same practical one which beset most of us in our youth, when facetious uncles expounded to us so plausibly how to catch a bird—the difficulty of putting the salt on his tail.

But you must not blame the law because your own lack of lissomness prevents you from dragging your adversary in front of the sword and scales.

The Law as a Livelihood.

This is written mainly for mothers.

It is usually the maternal hand that guides destiny in the matter of a career. No praise is intended, or blame imputed, to either party by that remark. It is merely a truism based on extended observation. It is the mother who devotes her thoughts, her prayers, and any back-stairs influence she may happen to possess, to the choice of a profession for her offspring. The male parent in these matters is apt to be partly a fatalist, partly an opportunist, and, anyway, cherishes few delusions as to the talents of his son, or the peculiar nobility of any particular occupation.

Why the Bar appeals is easy to understand. It fits in so. A satisfactory school career, success at the university, feats with the dead languages—the more impressive for being imperfectly understood — law tripos, a cultivated manner, a trick of easy speech. From these things it seems easy and natural to go on to dinners, a call, a brief, more briefs, reputation, wealth, politics, with finally the Bench, or the front benches, as inclination may rule.

There are, however, in that primrose path, gaps and hazards, thickets and sloughs, that would never be suspected.

There is no doubt that the word "pleadings" is responsible for much popular misconception as to the scenic aspect

of a barrister's work. It suggests intercession, rhetoric passion. Amiable ladies seeking a career for their sons, have a vision of a Court spellbound, dissolved in tears, the very Judge mopping his eyes, while an eloquent, pleading figure —cambric bands flying and with eyes turned to heaven— invokes the God of Justice and the Angel of Mercy in the interests of his wronged client.

Anyone who has been in a Court of justice knows that that sort of thing does not happen. Pleadings are not outpourings. They are not even vocal utterances. They are dull documents exchanged before trial with a view to making parties stick to the point.

What usually occurs is a stumbling prosy utterance, devoid of style and defective in syntax, prompted by the solicitor in front and the junior counsel behind, interrupted by "my learned friend" for the other side and delivered before an audience restless and indifferent, consisting mainly of discontented jurors in waiting and solicitors' clerks prowling from Court to Court in search of incidents to relieve the monotony of their day's work.

Eloquence is rare and viewed with suspicion. The very heaviest brief fees carry no obligation to display emotion in Court. Counsel do not even bang the desk with their briefs. Sergeant Buzfuz is dead.

The qualities that make for success at the Bar are not really those that occur to the popular imagination. Irony lies in wait for eloquence, and snubs for assurance. "Judicial notice" is not taken of academic distinctions. Rather is success to be found in familiarity with the rules of practice, in the nice estimate of the length of a Judge's foot, in a faculty for instant ready thought, in a knowledge of those tactics which display themselves in the Chamber practice, where many an action is, in reality, lost or won before it comes into open Court. And always drudgery, iron nerve, and a care and exactness never for a moment to be relaxed. Success at the Bar is a delightful achievement, but it is most difficult to attain; and of all forms of failure it can be the most complete. The unsuccessful grocer is made bankrupt, the financier falls from his greatness, the banker absconds and disappears. But the unsuccessful barrister simply never begins. He does not even get a run for his money.

Be pleased to hear what it may be like.

You don your robes and go into Court at 10.30. The Judge enters and bows to the Bar, and with the others you return the courtesy. The day's work proceeds, the title of affairs surrounds you, you watch the encounters—the merry cut and thrust—you sit and hear the subdued badinage of the crowded outer Bar. You are in it all, but not of it. The hand of the clock creeps round to 4.0. Punctual to the moment his lordship arises, bows, and disappears. You go out into the corridor, past the scattering solicitors' clerks and released jurymen; past the hot, tired advocate, who has left his clerk to gather his papers in various Courts, and is hurrying off to afternoon conferences. You go back to your own chambers, past the yawning, indifferent clerk, into your silent room. The afternoon sun slants on to the dusty carpet. A fly buzzes on the window-pane, the furniture fades, the papers and books yellow and rot. Day after day you do this, while hope dies and ambition takes wing, while nerve and pride and knowledge slip away, and the chill spectre of failure whispers, "You and I are acquainted." Oh! the tragedy of it—the long, bitter, silent, choking tragedy.

There remains the other branch of the law, sometimes referred to unkindly as the "lower" branch.

The old superstition that a glib tongue, an assured manner, and low moral preceptiveness indicate fitness for the profession of a solicitor dies hard. These are qualities much more likely to result, after heart-breaking disappointment to all concerned, in a single-fare passage to a distant colony, and a devout, if unspoken, prayer that the owner of them may not be seen again by his friends here.

There is not the same glamour about the solicitor as falls upon the barrister. In the eyes of the community the solicitor suffers perhaps an undeserved unpopularity. Men go to a solicitor as they go to a dentist—to ease them of some pain, or trouble. And it is often the duty of the solicitor, as of the dentist, to inflict further pain and trouble in curing the evil; and the bills of both are an irritating disbursement to have to make.

Moreover, high positions, the appointments that catch the eye and kindle the imagination, are not for the solicitor. At the start the advantage is certainly with the solicitor. The young barrister is fenced round with an iron etiquette.

He can get no work save through a solicitor. He cannot even make the will of his maiden aunt without that intermediary. The budding solicitor may not advertise his qualifications, but there are fifty ways in which indirectly he may and does, bring these qualifications into general notice. It is quite natural. "The young lions roar after their prey: they seek their meat!" But the old lion—the sleek and fatted lion—he lies quiet in the reeds and bushes. There is no more unobtrusive man than your matured and successful solicitor. Profits, not honours, are his. He is not in the Courts or on the platforms or in the papers. No searchlight plays on him. His work is silent, ceaseless and remunerative.

If a metaphor may be essayed, the successful barrister is an eagle who, from his golden perch, takes wing into the bright light of the legal, the official, or the political firmament. The successful solicitor is as the silkworm, who disappears in the golden cocoon of his own spinning.

For, after all, over the walnuts and the wine—between themselves—the solicitors will admit that, as things go, theirs is not an ill-paid profession.

Anyway, the public think so. Last month you might have seen that, at the final examination of the Law Society, 235 men qualified to practise as solicitors. That happens four times a year. A thousand young lions let loose upon the community in each year! In the same paper you may, perhaps, notice the death of a solitary solicitor at an advanced age, and possibly the bankruptcy, the disappearance, or the officially terminated career of one other.

A profession whose imports are so heavy and whose exports are so scanty must needs display the evils of competition and over-crowding. There are square miles in London, and large areas in the suburbs, where you could scarcely discharge a shot-gun at random without wounding a solicitor.

"The constant tendency in all animated life to increase beyond the nourishment provided for it." Poor old Malthus! His theories have never been popular, and in these days it is the fashion to ignore them. This is a lawyer-ridden country, people say. Nevertheless, it would seem that a time is coming when the almost countless solicitors will have to support a precarious existence by taking in each other's washing.

"WAKKERSTROOMS."

The Story of an Investment.

"In the Kafir Circus the depression is becoming more acute, and dealings of any kind are becoming exceedingly difficult in consequence. Dealers refuse to put any stock on their books, and selling becomes less easy day by day, for there are no buyers."

Financial Article, Daily Paper.

It "flopped" into the letter-box just as I was going to bed, so I lit a final pipe and sat down to peruse the fourteenth annual report and statement of accounts of the Wakkerstroom Mining and Land Development Company, Limited.

It really is good of them to go on sending it to me. How time flies! I cannot believe that it is fourteen years since I paid 2s. 6d. for a copy of the prospectus and humbled myself before a stockbroker's manager whom I had known and disliked at school. He saw that I got an allotment of 100, which straightway went to a premium of £1, and for a whole week I walked on air. I chuckled to myself when I thought of the "auriferous areas." I wearied my friends with learned dissertations about crushings and deep levels.

One day I bought another hundred of the shares, and had the satisfaction of reselling them at a profit the same day. I remember seeing my stockbroker dive into a seething mass in Throgmorton Street and emerge, breathless, to wring my hand.

"Sold 'em, old chap, at 2⅜."

Oh, the joy and the excitement of it! I bought lots of financial papers, and sucked in, with immense satisfaction, the golden prospects which lay before buyers of "Wakkerstrooms."

There was talk of a subsidiary company with preferential rights of allotment for shareholders. I began to feel a distaste for my daily occupation, and turned longing eyes towards the interests and opportunities that the Stock Exchange presented.

Then came the never-to-be-forgotten "slump."

"Hold on," said the stockbroker's clerk; and I held on. I remember deriving a sort of satisfaction from figuring out

that the last stand of the Jameson raiders must have taken place on ground forming part of the Wakkerstroom lands. I hoped that none of the machinery referred to so alluringly in the first report had suffered in the conflict. It had not—thanks to the fact that it arrived from Germany two years late, and was destroyed, somewhere near Laing's Nek, by an excited colonel of Yeomanry, who had confused notions as to the difference between mine gear and machine guns, and preferred to take no chances.

The accident was of the less importance, however, in that, had the machinery arrived, it would not have been required.

"Your directors, having discovered as the result of further patient development that the low-grade ore is not likely to repay the cost of working, have decided to abandon these claims and to concentrate their efforts upon the farms of the company. They trust that, with more settled political conditions," etc.

I have never brought myself to think bitterly of those directors, with their foreign-sounding names; but they did not concentrate their efforts. They dissipated them. They put money into waterworks, and bought a third share in an hotel. They traded in ostrich feathers and mealies. They even tried pigs. They promoted the Trickyfontein Diamond Mine, and, when that failed, they applied to the Courts for permission to enlarge their sphere of activities, so as to take a hand in West Australian schemes—that particular sort of venture being popular just then in London.

And all this time our cash capital melted. The rebuff over West Australia must have disheartened them, for just about then they shed the two English directors, changed the name of the company, realized what were left of the pigs, and sat down to wait till the clouds rolled by.

Two successive reports expressed a hope of speedy recovery in South African affairs, and meanwhile "your directors are conserving the assets," etc. A footnote by the auditors stated that these assets, as they figured in the balance sheet, were taken at the cost price appearing in the company's books—a statement which may have been intended to be reassuring and, on the other hand, may have been in the nature of a "hedge" on the part of the auditors.

Then we amalgamated with another company. It happened in South Africa, and English shareholders, of course,

knew nothing about it till it was practically complete. I received full reports of long speeches by both chairmen shewing the enormous benefit to the companies. Boiled down, the basis of the "deal" seemed to be that we had cash but no "market," whereas in the other company there was a market, but no cash.

There ends what may be called the active history of the company. As I said, they always send me the annual report, often with a coloured binding, and sometimes with a map. Once they called in my share certificate and reissued a fresh one. That was when they changed the name, and the secretary took the opportunity of remonstrating with me, in a dignified way, by pointing out the advisability of at once apprising him of any change of address. It was evidently his opinion that my carelessness might, some time, endanger my chance of participation in a good thing.

And all the time our market "quotation" dropped silently, steadily, ceaselessly. You will not see it at all now at ordinary times, but twice a month, when the financial papers publish what I think are called settlement figures, you may find "Wakkerstrooms 1-16." When, however, I thought to get a five-pound note for my hundred shares, my stockbrokers told me that there was no market; the quotations were purely nominal.

It is marvellous how the old company lingers on. Nothing to do, nothing to expect. Sans hope, sans faith, sans reputation, sans object. Only that dwindling cash balance for the directors and staff to use up. Really, like Charles II., we are an unconscionable time a-dying. One feels quite apologetic towards those accountants who have so long audited us, and who, as liquidators, should have the interring of our bones.

It eases one to be sarcastic, but really I ought not to complain. As George Meredith says, "Our new thoughts have thrilled dead bosoms." One hundred and fifty years ago, just the same thing was going on in just the same spot. One calls to mind a picture in the portrait gallery of Macaulay—one where that doughty controversialist is dealing severely with a statesman of the past, whose character, alike in its strength and in its weakness, was congenial matter for the Macaulay style of treatment:

"When the South Sea Company were voting dividends of 50 per cent., when a hundred pounds of their stock were

selling for eleven hundred pounds, when Threadneedle street was daily crowded with the coaches of dukes and prelates, when divines and philosophers turned gamblers, when a thousand kindred bubbles were daily blown into existence—the periwig company, and the Spanish jackass company, and the quicksilver fixation company—Walpole's calm good sense preserved him from the general infatuation. He condemned the prevailing madness in public, and turned a considerable sum by taking advantage of it in private."—

It is interesting to note that when the crash came in those days it was proposed, by members of the House of Commons, that the directors should be tied up in sacks and thrown into the Thames. Our modern Directors' Liability Act is but a tame substitute for such drastic treatment.

I am not bitter. I do not grudge my hundred pounds. Experience cannot be learned at school, or acquired from books, or borrowed from our friends. It can only be bought. And the price is usually hard cash. There are many ways in which I may yet display unwisdom in parting with money. Ambition, folly, credulity, and avarice, in any of their hundred forms, may lie in wait and successfully assail me. But I think I am proof against gold, diamonds, or any other products of South Africa proffered me through the medium of the Stock Exchange.

> "Yon rising Boom that looks for us again,
> How oft hereafter will she wax and wane?
> How oft hereafter look for us
> Through Kafir markets—and for *one* in vain?"

I hope the shade of Omar Khâyyâm will forgive me for that.

GEORGE A. MACDONALD.

ASSUMPTION OF RISK UNDER THE NEW YORK LABOUR LAW.

The Supreme Court of New York has, in several decisions, been giving attention to an amendment to the Labour Law passed in 1909, changing the common law doctrine of assumption of risk. The latest case coming to our attention is reported in 45 New York Law Journal, 1059, of date June 1, 1911, under the title, *Chernick* v. *Independent American Ice Cream Co.*

In that case three Judges of the Appellate Division of that Court, held by a majority, that this amendment does away with assumption of risk, as matter of law, by reason of an employee continuing in service after he has discovered or been informed of the master's negligence in failing to keep working place or tools or appliances reasonably safe.

The start of the assumption of risk doctrine in *Priestly* v. *Fowler,* in England, and in *Murray* v. *South Carolina R. Co.* and *Farwell* v. *Boston & W. R. R. Corporation* in this country, the opinion in the last case being by Shaw, C.J., is well known. It has been applied very strictly by some Courts and very confusedly by others. All kinds of refining about master's superior knowledge; employee's equal opportunity to know of defect; inexperience of servants; sufficiency of warning; inspection by master; the right of servant to assume master has done his duty and obvious and glaring risks, have made of our law on this a medley, apparently getting worse the further it proceeds.

It certainly seems that here is presented and has been presented for some time a demand for legislation to get our Courts out of the tangle they are getting into more deeply every day.

The New York legislature came to the rescue in an amendment of its Employers' Liability Act, whereby it provided that an employee "shall be presumed to have assented to the necessary risks of his employment and no others," which risks "are only those inherent in the nature of the business which remain after the employer has exercised due care in providing for the safety of his employees." So that the purpose of this enactment might not be possibly misunderstood, the law then goes on to say, that if the employer does neglect to do his duty and increases hazard, continuance in service after discovery by the employee, or he has been informed, of such neglect "shall not, as a matter of law, be considered as an assent by such employee to the existence or continuance of such risks of personal injury therefrom, or as negligence contributing to such injury. The question whether the employee understood and assumed the risk of such injury, or was guilty of contributory negligence, by his continuance in the same place and course of employment with knowledge of the risk of injury shall be one of fact."

This law seems to us a model enactment. It is one to which no employer solicitous for the lives and limbs of those to whose fidelity and skill he looks for success in his business should object, and it is the only kind of a curb that may begin to restrain those who are otherwise.

We believe that it is ill-paid employees, more than the skilled, that dangers not inherent to the business most affect. It is not of the dangers inherent to a business that intelligent workmen complain. They would no more think of objecting to dangers of the service than would a soldier, but it is the increased hazard that flows from neglect, careless or studied, because it is cheaper not to give to human beings the protection they ought to have.

Where labour is unskilled, can it afford, often, to abandon work because the employer's negligence has added obvious risks to its performance, and that without one dollar's increase in remuneration? We never have heard where any employer has told his employees that because of his failure to keep their working-place as safe as it should be, he would increase their wages.

If he made a straight-out offer of that kind it would resemble something like trafficking in flesh and blood, and yet he does this very thing when he neglects his duty upon the assumption that employees will not quit.

But in whatsoever way he may look at the matter, he would not have as much inducement to go into nice calculations upon the question whether it were more profitable to give a safe working-place or be held to a reasonable certainty of paying for neglect in this regard, if obvious danger arising from neglect were not an assumed risk.

Long ago the principle was evolved that a common carrier could not contract for non-liability for his own negligence, and the *rationale* of this principle lay in the fact, that he and the other party to the contract were not upon terms of equality.

How may anyone imagine a greater disparity in footing than that between an employer and an employee, when the latter, complaining of a defect, would be told that it was his privilege to quit if he did not like it? In the first place, it is not the habit of American workmen to run away from work, because there may be some increase of danger about it.

In the second place, with unskilled labour, with girls and women and children who work, there is a danger in the rear if they attempt to flee from that in front.

But there is policy enough and to spare for such a statute in the fact, that this Judge-made doctrine, travelling around in our numerous jurisdictions and appearing in all sorts of shapes and disguises, needs the tyrant voice of a statute to discard it or prescribe for it definite limitations. We call attention to page 443, *Central Law Journal,* for a case with annotation, selected as an illustration of the truth of what we are urging.—*Central Law Journal.*

IN THE SUPREME COURT OF CANADA.

[JUNE 1ST, 1911.

SMITH v. GOWGANDA MINES.

Joint Stock Company—Allotment of Shares—Surrender of by Allottee—Unpaid Calls—Transfer—Waiver.

S. subscribed for shares in a mining company, was notified of allotment of the same and paid the amount due on a first call as agreed. Later he notified the company that he withdrew his subscription and refusing to pay further calls was sued therefor. It turned out that when S. subscribed for the stock all the shares had been allotted by the company and that given to him had been obtained by surrender from one of the original allottees

Held, that under the Ontario Companies Act when stock has been allotted by a company the only case in which the directors can regain control of it is that of forfeiture for non-payment of calls. As in this case there was no forfeiture, the company did not legally own the stock allotted to S., and could not compel him to pay for it.

Held, also, that the provision in said Act that stock on which calls are unpaid cannot be transferred is imperative and cannot be waived by the company.

Appeal allowed with costs.

Hellmuth, K.C., and *Ziba Gallagher,* for appellant.
Smythe, K.C., for respondents.

The Library

"And what of this new book?"—*Sterne.*

"Men disparage not antiquity who prudently exalt new enquiries."
—*Sir Thomas Browne.*

Evidence and Practice at Trials in Civil Cases. By R. E. Kingsford, M.A., LL.B. Toronto: The Carswell Company, Limited, 1911. 666 and lviii. pp. Cloth, $8.00; half-calf, $9.00.

The last edition of this most useful work appeared in 1908. While there are several changes in the arrangement of the text in this new edition the general plan is unaltered. The references to the cases decided since 1908 are most complete. Every practitioner needs a handy work of this character always within his reach during office hours. Besides it will be found invaluable for quick reference at trials. The index has been carefully prepared.

New Code of International Law. By Jerome Internoscia of Montreal. First edition 1910.. Publishers: The International Code Company of New York. Toronto: The Carswell Company, Limited. Price $12.00.

On examining this work of 1003 pages in which the author attempts to provide a code of international law one is struck with the author's marvellous industry. There are 5657 articles in three parallel columns, English, French and Italian. Part I. deals with public international law: Part II. with private international law; Part III. with international legislature, magistrature, procedure and execution. Although the code does not contain the word "war" it aims at setting forth a complete body of rules which will answer the needs of all nations if only they would unite to revise and then adopt it as an "International Code." The author does not claim to have created this body of law but having collected the productions of many minds of many centuries, he has analyzed and scrutinized their ideas, and after discarding everything base or tainted he believes that what is left is

approximately perfect, all passion, prejudice and preference having been eliminated.

About two-thirds of this code contain what is found in books on International Law published during the last two or three generations. The rest is "a longing for universal peace." Only a new system of law may be expected to bring peace. The first and most important innovation is the abolition of war. There must then be an international procedure. Consular Courts must be abolished; all States must be equal. Every man be he peasant or sovereign must have the same well-defined international right. Capital punishment is to be abolished. The establishment of an International Assembly as a Legislature and Court is also proposed.

RECENT AMERICAN DECISIONS.

ALTERATION OF INSTRUMENTS.—A merely verbal change in a contract, to correct a mistake in designation of a party, that does not vary its meaning in any essential particular, nor affect the liability of the party to be charged thereon, is held in *Blenkiron Brothers* v. *Rogers* (Neb.) 31 L. R. A. (N. S.) 127, to be an immaterial alteration.

ATTORNEYS.—An attorney, under his general retainer, is held in *Gibson* v. *Nelson* (Minn.) 31 L. R. A. (N. S.) 523, to have no implied power to settle and compromise his client's cause of action, except when confronted with an emergency, and prompt action is necessary to protect the interests of the client, and there is no opportunity for consultation with him.

BROKERS.—Where an agent for the sale of real property, charged, as a matter of law, with the usual obligations incident to that relation, informs his principal that he has secured a purchaser of the property, and procures from the principal an executory contract for the sale thereof, in which the name of the purchaser is not given, and he subsequently inserts in the contract his own name as purchaser, the relation of principal and agent, if the principal ratifies the contract, is held in *Christianson* v. *Mille Lacs Land & L. Co.* (Minn.) 31 L. R. A. (N. S.) 536, to cease, and that of vendor and purchaser to take its place.

CARRIERS.—A city passenger and ticket agent of a railroad company is held in *Hayes* v. *Wabash R. Co.* (Mich.) 31 L. R. A. (N. S.) 229, to have implied authority to guarantee connections by one of its regular trains, which is necessary to permit an intending passenger to reach its destination at a specified time.

One who, although intending to board a car, is 1235 yards from the station when the car arrives, is held in *Mitchell* v. *Augusta & A. R. Co.* (S. C.) 31 L. R. A. (N. S.) 442, to have no right to complain that it does not wait a sufficient time to enable passengers to embark before it proceeds on its journey, since, not being at the station, the carrier is held to owe him no duty.

If a passenger on a railroad train has alighted at his point of destination and is proceeding by the usual way to leave the railway company's premises, but, before actually doing so, is halted by the discharge of a gun, and a report that his brother, a fellow passenger, has been shot by a special police officer of the railway company, and in good faith and without the intention of engaging in the difficulty returns to relieve his brother, it is held in *Layne* v. *Chesapeake & O. R. Co.* (W. Va.) 31 L. R. A. (N. S.) 414, that he should be regarded as reasonably and necessarily delayed, and as continuing to be a passenger, entitled as such to the protection of the railway company and its agents, and if assaulted by such police officer or agent of the railway company, the railway company is held to be liable to him in damages for injuries sustained.

A railroad company which requires passengers to cross tracks in the night to board a train is held in *Dieckmann* v. *Chicago & N. W. R. Co.* (Iowa) 31 L. R. A. (N. S.) 338, to be obliged to provide a reasonably safe way for the crossing to be made, and to exercise the highest degree of care to protect them from injury in making the passage.

A contract fixing, for purposes of transportation, the value of an article delivered to a carrier for that purpose, is held in *Adams Express Company* v. *Berry & Whitmore Co.* (D. C.) 31 L. R. A. (N. S.) 309, not to operate to relieve the carrier from liability to pay the full value of the article if it was embezzled by its agent.

In the absence of a special contract, a railroad company, by receiving goods for transportation over its own line and other lines therewith connected, is held in *Roy* v. *Cheas-*

apeake & O. R. Co. (W. Va.) 31 L. R. A. (N. S.) 1, to be only bound to carry the goods over its own line, and deliver them safely to the next connecting carrier.

DAMAGES.—The mental suffering for which the law permits an allowance of damages when it is caused by personal injuries inflicted by another's negligence is held in *Merrill* v. *Los Angeles Gas & E. Co.* (Cal.) 31 L. R. A. (N. S.) 559, to include the mental worry, distress, grief, and mortification which may be shewn to exist because of the injury.

ESCROW.—The mere deposit in a bank of a deed executed in accordance with a parol contract to convey real estate, with directions to return it to the maker upon non-performance of certain specified conditions, is held in *King* v. *Upper* (Wash.) 31 L. R. A. (N. S.) 606, not to constitute an enforceable escrow agreement.

INJUNCTION.—That a solicitor for a merchant, who works on certain routes, selling goods to customers on a commission, may, in case he appropriates the list of customers upon engaging to work for a rival merchant, be compelled to return the list, and be enjoined from using it or a copy of it, or shewing it to others, is declared in *Grand Union Tea Co.* v. *Dodds* (Mich.) 31 L. R. A. (N. S.) 260.

That injunction will lie to prevent an employee whose position gives him possession of his employer's trade secrets from violating his contract not to enter the service of a rival concern within the duration of the contract, is declared in *McCall Co.* v. *Wright* (N. Y.) 31 L. R. A. (N. S.) 249, although the contract also provides that he may be discharged upon thirty days' notice, and he gained a portion of his knowledge of the business before the contract was made.

NEGLIGENCE.—The employee of one who has insured a property owner from loss through apparatus on his property, by a policy giving the insurer the right to inspect the premises, who, with the consent of the assured and under the guidance of his employee, attempts to make the inspection by direction of his employer, is held in *Dashfields* v. *W. B. Moses & Sons* (D. C.) 31 L. R. A. (N. S.) 380, not to be a mere licensee on the premises, but to be entitled to the rights of an invitee, in determining the liability of the as-

sured for injury to him through unsafe condition of the premises.

The caretaker of a house who attempts to close a window to avoid injury to the property from a stream of water negligently turned into it by another, which will necessarily result in her getting wet, is held in *Taylor* v. *Home Teleph. Co.* (Mich.) 31 L. R. A. (N. S.) 385, to assume the risk of injury from a resulting illness, although she did not anticipate illness to result from her act.

NUISANCE.—The maintenance of an undertaking establishment in a residence part of a city, within a few feet of neighbouring residences, is held in *Densmore* v. *Evergreen Camp* (Wash.) 31 L. R. A. (N. S.) 608, to be properly enjoined by their owners as a nuisance, in view of the probable interference with the comfortable enjoyment of their property by the depressing effect of the reminders of mortality, and the escape of noxious odors and gases from the chemicals used in the business; and it is held to be immaterial that the owner of the business intends to reside in the upper storeys of the building.

SPECIFIC PERFORMANCE.—Specific performance of a contract for the exchange of identified corporate stocks is held in *Hogg* v. *McGuffin* (W. Va.) 31 L. R. A. (N. S.) 491, to be properly decreed where legal remedy would not be adequate because the stock sought has no certain ascertainable value and cannot be purchased in the market and a money judgment against the party would be worthless because of his insolvency. The authorities on the question of specific performance of contract for sale of stock in corporation are collated in a note to this case.

TELEPHONES.—The establishment in the franchise of a telephone company of a maximum monthly rental to be charged by it for service is held in *State ex rel. MacMahon* v. *Independent Teleph. Co* (Wash.) 31 L. R. A. (N. S.) 329, not to prevent its requiring the rentals to be paid in advance, and making an additional charge in case they are not paid before a certain specified day each month.

Exacting from some patrons payment of rental in advance, while giving credit to others, is held in *Vaught* v. *East Tennessee Telephone Co.* (Tenn.) 31 L. R. A. (N. S.)

315, not to be a discrimination among patrons on the part of a telephone company, which will subject it to a statutory penalty provided for such discrimination.

CANADIAN NEWS.

James Baird, K.C., Crown Attorney of York county, Ont., died on the 5th July. He was called to the Bar in 1888, created a K.C. in 1908, and in 1909 was appointed Crown Attorney of York county.

H. D. Stewart, barrister, Barrie, died on the 1st July.

Geo. D. Minty, of the law firm of Tupper, Minty & McTavish, Winnipeg, died on the 2nd July.

W. S. Hall, barrister, L'Orignal, has removed to Vankleek Hill where he will practise in future.

The following have been called to the Bar of the province of Quebec:—J. A. Pelletier, A. Bournival, W. R. Hastings, L. Melancon, C. Thompson, L. Joran, L. Fitch, A. Grenier, J. A. Grenier, W. F. Monk, F. T. Nicholson, J. A. Millette, J. O. Gagnon, P. L. Dupuis, R. Fleet, L. A. Richard, O. Thibault, M. Dupuis, M. Murrill, A. Laferte, G. Vanier, M. Bernier, A. Leduc, R. Finast Flynn and J. R. Vanier.

Hon. A. K. McLean, Attorney-General of Nova Scotia, will remove to Montreal where he will practise in future.

Jno. J. Mackay, barrister, Tatamagouche, N.S., died on the 25th June.

The following have been admitted to the Alberta Bar:—N. R. Lindsay, Edmonton, J. T. Shaw, Calgary, F. deR. deSales, Calgary, G. C. Valens, Edmonton, J. N. Oldham, Calgary, H. H. Gilchrist, Calgary, Frank Pottage, Edmonton and A. Grant, Strathcona.

The following have been called to the British Columbia Bar:—G. E. Housser, G. R. McQueen, G. L. Cassidy, A. W. Milligan, T. Todrick, R. R. Maitland and J. E. Sears.

Scotch solicitors for admission:—G. Rennie and John Ewen.

B. C. solicitor for call:—A. Alexander.

English solicitors for admission:—T. F. Hurley, R. V. L. Johnston, L. St. J. Steadman and J. H. Ryley.

Eastern barristers and solicitors for call and admission:—J. H. Black, S. Alexander, G. J. Gaetz, W. A. Scott, N. R. Robertson, A. M. Matheson, F. J. Stacpoole, C. W. St. John, C. V. Reay, A. A. Fraser, W. B. A. Ritchie, P. J. McIntyre, J. B. Noble, G. M. Blackney and J. Y. Copeman.

The semi-annual meeting of the Benchers of the Alberta Law Society was held at Lethbridge on the 4th July. The Lethbridge Law Society entertained the visiting lawyers to a banquet and Mr. Coneybeare, the vice-president, also entertained them at his residence. The next meeting will be held at Edmonton. The business transacted was purely routine.

J. H. Chalmers has joined the law firm of Goulter and Singer, Virden, Manitoba.

Alfred Howell, barrister, died at Huntsville on the 9th July. The late Mr. Howell was well known as the author of Howell's Surrogate Court Practice.

O. M. Arnold, K.C., Bracebridge, died on the 12th July.

J. A. MacInnes, barrister, Yankleek Hill, has removed to Vancouver.

H. J. Dawson, of the law firm of Hyndman & Hyndman, Edmonton, has retired from that firm and will not resume practise for some time.

C. A. Grant of the law firm of Bishop, Grant and Delavault, Edmonton, has withdrawn from that firm intending to practise alone.

The law firm of McKinnon & Cogswell, Edmonton, has been dissolved, each partner intending to practise alone.

The law students of Vancouver have issued an annual.

The Canadian Law Times.

VOL. XXXI. OCTOBER, 1911. No. 10.

"MISTAKEN IDENTITY."*

It has been observed by Mr. Pitt Taylor that the minds of jurymen, especially in the remote provinces, are grievously open to prejudice. "The production of a bloody knife, a bludgeon, or a burnt piece of rag may sometimes," he assures us, "by exciting the passions, or enlisting the sympathy of the jury, lead them to overlook the necessity of proving in what manner these articles are connected with the criminal or the crime." And, indeed, in this abuse of what is technically known as "real" evidence satirists have from early days found a fruitful theme. It is on this foundation, as the same Judge—following Archbishop Whately—points out, that Shakespeare makes Jack Cade's nobility to rest. Mr. Jack Cade having asserted that the eldest son of Edmund Mortimer, Earl of March, "was by a beggar woman stolen away," "became a bricklayer when he came to age," and was his father, one of the rioters confirmed the story by saying, "Sir, he made a chimney in my father's house, and the bricks are alive at this day to testify it—therefore deny it not." And in the same way, in the interesting story of "The Amber Witch," of which we have a translation at the hands of Lady Duff Gordon, the poor girl charged with witchcraft—after complaining that she was the victim of the Sheriff, who wished to do "wantonness with her"—added that he had come to her dungeon the night before for that purpose, and had struggled with her, "whereupon she had screamed aloud, and had scratched him across the nose, as might yet be seen, whereupon he had left her." To this the Sheriff replied "that it was his little lap-dog called Below which had scratched him while he played with it

* *The Juridical Review.*

that very morning," and having produced the dog, the Court were satisfied with the truth of his explanation! And it is this very same wil ingness to be satisfied by the presentation of things that of themselves are incapable of misrepresentation that, absurd as it may seem, too frequently leads juries, with regard to the identification of things and persons, to forget that what is presented by a skilful tempering hand may be made to misrepresent. I hope to adduce a sufficient number of cases to put this statement quite at rest, and if any are then unsatisfied, I am sure after a perusal of the authorities I shall cite at the close they will be convinced.

In 1804 New York was the scene of a trial for bigamy. Judge Livingston presided, and the whole evidence turned on the question of the prisoner's identity. The public prosecutor called the indicted Thomas Hogg, the indicted called himse'f Joseph Parker. In this dilemma several witnesses swore that they had known him under the name of Thomas Hogg, and among them was a female whom some Thomas Hogg had married and had afterwards deserted. It was stated that Hogg had a scar on his forehead, a small mark on his neck, and that his speech was quick and lisping. All these peculiarities were found upon the prisoner. Two witnesses went further: they deposed that Hogg had a scar under his foot, occasioned by treading upon a drawing-knife; and that this scar was easy to be seen, and had been seen by them. On examining his feet in open Court no scar was to be found on either of them; and it was further proved that, at the period of his alleged courtship of the second wife in Westchester county, he was doing duty as a watchman in the City of New York. The jury acquitted him. They could not do otherwise.

An *alibi* is of even more satisfactory a nature when it can be proved by records beyond private control. Some such limitation is evidently necessary, for to urge an *alibi* is to beg the question of identity. It cannot, therefore, be allowed to be of so definite a nature when it is of the kind presented in a pleasant little story in the *Argosy* some years ago, entitled "Three Minutes to Twelve." There, indeed, there is sufficient artistic skill to engage the sympathy of the reader, but still it is in essence of a distinctly different kind of force to that which marks the following instance: On the 14th of September, 1772, there came on at the sessions of the Old Bailey, the trial of one Male, a

barber's apprentice, for robbing Mrs. Ryan, of Portland street, on the highway, on the 17th of June preceding. The witnesses swore positively to the identity of the lad, and the whole Court imagined him guilty. He said nothing in his defence, but that he was innocent, and his evidence would prove it. His evidence was the books of the Court, to which reference being made, it appeared that on the day and hour when the robbery was sworn to be committed the lad was on his trial at the bar, where he then stood for another robbery, in which he was likewise unfortunate enough to be mistaken for the person who committed it. And he was honourably acquitted!

Of a different character are those cases in which, though the evidence proceeds to less or more extent on some part of the person or fragment of dress, the weight of evidence arises from other confirmatory circumstantial matters. An interesting illustration is offered us in the fifth volume of *Causes Célèbres.* Once upon a time—this has a smack of the nursery—a woman-merchant, full of years and a widow, kept a little shop. Behind the shop was a back room, where the good woman slept. Rumour had it that she was rich, and her sole companion was a boy-servant. He slept on the fourth story, the staircase leading to which had no means of communication whatever with his mistress's rooms, so that he was compelled to go into the street to reach it, and had made it his custom as he went to bed to shut the outer door of the shop and carry off the key, of which he was the only custodian. One day this door was noticed to be opened earlier than usual, although there were no indications that either the widow or her boy was stirring, and neighbourly curiosity was excited. The first look round did not yield much. The door was intact. But presently was found a bloody knife, and then the woman-merchant, slain in her bed, with the unholy weapon at her side. The corpse clutched with one hand a bunch of hair, with the other a cravat. Near the bed was a coffer broken open. The shop-boy was seized. The knife was his. The cravat was his. The hair was his. The key of the chamber was in his room. He was the murderer—at least he confessed it was so, and he was broken on the wheel. But as time rolled on another boy, a wine merchant's serving lad, was arrested for some other crime. Life despaired of, he wrote a last confession, and in it said that he was guilty of the fact connected with the Place St.

Michael. The cabaret at which he served adjoined the assassinated widow's shop. He was familiar with her boy, and he it was to whom her lad had looked to dress his hair *en queue*. As it was combed it was easy to put apart the savings—this made the bunch the deceased woman held. His comrade's knife and a tie were as readily procurable, and, the impression of the shop key once taken off in wax, it was nothing strange to fabricate a false one.

But a confession has sometimes been more happily extracted before it is too late. More than a century ago—the authorities are Paris and Fonblanque—a respectable young fellow was tried for a highway robbery committed at Bethnal Green, in which neighbourhood both he and the prosecutor resided. The prosecutor swore positively that the prisoner was the man who had robbed him of his watch. The prosecutor was ordered out of Court, and in the interval another young man, who awaited his trial on a capital charge, was introduced and placed by the side of the prisoner. The prosecutor was re-introduced, and, placed in the witness-box, was addressed by the prisoner's counsel thus: "Remember, the life of this young man depends upon your reply to the question I am about to put. Will you swear again that the young man at the bar is the person who assaulted and robbed you?" The witness turned his head toward the dock, when, beholding two men so nearly alike, he dropped his hat, became speechless with astonishment for a time, and at length declined swearing to either. The prisoner (respecting whom a young woman to whom he paid his addresses proved a complete *alibi*) was, of course, acquitted, and a short time after, and a few hours before his death, the second young man, who was convicted of the other offence and duly executed, acknowledged he had committed the robbery in question.

Somewhat similar is a case cited by Mr. MacNally upon the occasion of the trial of James Byrne for high treason. It is given in Howell's State Trials, vol. 28, p. 819. Sir Thomas Davenport, an eminent English barrister, a gentleman of acute mind and strong understanding, swore positively to the persons of two men whom he charged with robbing him and his lady in the open daylight. He was positive, and the hour, he stated, was about two o'clock in the afternoon. But it was proved by the most conclusive evidence, that the men on trial were at the time of the robbery

attending a company at dinner, one as master of the tavern, the other as waiter, at so great a distance from where Sir Thomas was robbed that the thing was impossible. The consequence was the men were acquitted, and some time after the robbers were found, and the articles taken from Sir Thomas and his lady discovered upon them. Sir Thomas, upon seeing these last men, candidly acknowledged his mistake, and, as I have heard, continues Mr. MacNally, gave a recompense to the persons he prosecuted, and who so narrowly escaped conviction.

The last example I propose to give will be of interest, as it is a Scottish case. A resurrection-man was tried at the High Court of Justiciary in Edinburgh for raising the body of a young woman from the churchyard at Stirling. Nine weeks after death the body was discovered and identified by all the relations, not only by the features, but by a mark which they believed could not be mistaken, she being lame of the left leg, which was shorter than the right. There was a good deal of curious swearing as to the length of time after death that the body could be recognized, but the jury were convinced that the libel was proven, and gave a verdict accordingly. "Now," says Dunlop, on whose authority the story rests, "I am certain that this was not the body of the woman who was taken from the churchyard at Stirling, but one that at least six weeks after the time libelled was buried in the churchyard at Falkirk, from which she was taken by this man, who also took the other, for which he was tried. She also was lame of the left leg. Thus, though guilty of the offence laid to his charge, he was found guilty by a mistake of the *corpus delicti*."

Among the authorities those caring to investigate this subject will do well to consult are Theodoric Romeyn Beck's Elements of Medical Jurisprudence (1842, 7th ed., pp. 404-410); Paris's Medical Jurisprudence (vol. i. p. 222); Wm. Wills's Essay on the Principles of Circumstantial Evidence (ed. Alf. Wills Butterworth, 1862, pp. 113-127); W. G. Dickson's Treatise on the Law of Evidence in Scotland (ed. John Skelton, 1864, pp. 191-193); Bentham's Rationale of Judicial Evidence (bk. v. ch. 15, sec. 4 (*n*)—or Works, vol. 7 pp. 75-6); Best's Principles of the Law of Evidence (5th ed., p. 656, n. (*a*)); Case of James Crow in Theory of Presumptive Proof (Appendix, Case 4); the article on "Identity" in the Cyclopedia of Practical Medicine; Rus-

sell on Crimes, ed. Prentice; and the law dictionaries and abridgments under the titles Rescue, *De Identitate Nominis*, Escape, Outlawry, Arrest, False Imprisonment, Reprieve and many others. Then beside, of a more anecdotal character, are cases commented on in All the Year Round under the head "Striking Likenesses," 28th September 1861; incidents in the lives of the Brothers Rignold and of the Brothers Blanc; several cases in Pliny; the instance of Mary Moders; the quarrel between Kne'ler and Wallis about the son of James II.; claims to royalty, of which Mr. Ingram made a collection; and the memorable cases of "Roger Tichborne" and Adolf Beck. There are many other cases which I could cite, but I shall leave it to the industry of the reader to discover them.

GEORGE STRONACH.

"CONTRACTS NOT TO BE PERFORMED WITHIN A YEAR."

Every one has at his fingers' ends the 4th section of the Statute of Frauds. No action, it runs, shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or to charge the defendant upon any special promise to answer the debt, default or miscarriage of another, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged or some person thereunto by him lawfully authorized. Pages might be devoted to a discussion of the difficulties with which the famous section teems. We propose to consider in this article the doubts which have arisen in determining whether an agreement is one which is not to be performed within one year from the making thereof, a question which, like many others in the law, is by no means so simple as it looks.

The leading case on the subject is *Peter* v. *Compton*, decided over two hundred years ago. There it was held that

the statute only applied to agreements which were in their terms incapable of performance within a year, and accordingly the festive Compton, who had in consideration of a guinea down, promised Peter one thousand guineas on his wedding day, could not plead the statute because Peter might have got married the following day, although as history tells us he did not as a matter of fact, get married for several years afterwards.

If, however, the agreement is silent as to the date of performance, but is from its nature and upon its true construction incapable of being performed within a year, then it is treated as being within the section. Thus in *Boydell* v. *Drummond* (11 East. 142), a series of prints of scenes from Shakespeare was to be published by subscription. The defendant was a subscriber, who had not bound himself by writing. The prospectus stated that 72 scenes would be painted, the whole to be published in numbers, each containing four prints, and one number, at least, was to be published annually after the delivery of the first. It was held that the prospectus clearly contemplated the completion of the work taking place beyond the expiration of one year, and the case was therefore within the statute, and that the action failed in the absence of a written agreement. Lord Ellenborough said that the whole scope of the undertaking shewed that it was not to be performed within a year, and even if it could have been performed within that time, yet the whole work could not have been obtruded upon the subscribers at once so as to have entitled the publishers to demand payment of the whole subscription from them within one year.

If the contract be in its terms incapable of performance within a year it must be in writing, although it may be defeasible within the year. Thus a contract with a coachmaker to hire a carriage for five years on the understanding that the agreement might be put an end to at a moment's notice, is within the section. (*Birch* v. *Liverpool*, 9 B. & C. 392.)

The terms of a contract may not require that the contract shall continue beyond the year, and it may be a contract which is capable of being performed within a year. In such a case the contract will not fall within sec. 4. A common example is where the contract is to last for the life of a named person. Thus in *South* v. *Strawbridge* (2 C. B. 808), it was decided that a contract by the plaintiff to main-

tain a child so long as the defendant should think proper was not within the section. Tindal, C.J., said: "The statute speaks of 'any agreement that is not to be performed within one year from the making thereof,' pointing to contracts the complete performance of which is of necessity extended beyond the space of one year. That appears clearly from *Boydell* v. *Drummond*, the rule to be extracted from which is, that where the agreement distinctly shews upon the face of it, that the parties contemplate its performance to extend over a greater period of time than one year, the case is within the statute; but that when the contract is such that the whole may be performed within a year, and there is no express stipulation to the contrary, the statute does not apply."

The same point came up in *Macgregor* v. *Macgregor* (21 Q. B. D. 424), where a husband verbally agreed to make his wife an allowance of £1 a week for maintenance, and in an action to recover arrears the plea of want of writing was overruled. The Court treated the above quoted passage as laying down the true rule, viz., that if the agreement shews that its performance must extend beyond the year it is within the statute; but if it may be performed within the year and there is no express stipulation to the contrary, it is outside the statute.

In the recent case of *Lavalette* v. *Riches & Co.* (24 T. L. R. 336), the defendants set up a parol agreement between the plaintiffs and themselves whereby they were to be the sole agents in England for the sale of certain patented goods of the plaintiffs until the patent should be taken over by a company. At the date of the agreement the patent had about ten years to run. Therefore, if no company was formed to take the patent over, the agreement would run for ten years, but might at any time come to an end by the company being formed. At the first trial Walton, J., held that this was an agreement which was not to be performed within the year, though there was a possibility of defeasance within the year, and, following *Birch* v. *Liverpool*, held that it came within the section. But the Court of Appeal decided that it fell within the principle of *Macgregor* v. *Macgregor*, and did not come within the section, because in its terms it was capable of being performed within the year. The test was stated as follows: "If the contract is one which in its terms is capable of being performed within the year it does not

come within the section. But if the contract is one which from the statement of the time within which it is to be performed or for some other reason, manifestly upon its face or upon the true construction of its terms, cannot be performed within the year, it does come within the section. And if there is on the face of the contract a fixed time longer than a year specified for its performance, the inclusion of a defeasance stipulation which may end it within the year, does not save from the statute."

It may be that the contract is capable of being entirely executed by one party within a year. The question then is, is such a contract within the section. In *Donellan* v. *Read* (3 B. & Ad. 899), a landlord demised premises for a term of years at £50 a year and agreed with his tenant, when several years were unexpired, to lay out £50 in improvements, the tenant undertaking to pay an increased rent of £50 during the remainder of the term. The improvements were completed within three months, but the tenant refused to pay more than the original rent. It was held that the section did not apply, Littledale, J., saying: "We think that as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the Statute of Frauds does not extend to such a case." Further cases in support of this view are *Cherry* v. *Heming*, 4 Ex. 635, *Smith* v. *Neale*, 2 C. B. N. S. 67, and *Miles* v. *New Zealand Alford Estate Co.*, 32 Ch. D. 296, which, put shortly, lay down that an agreement which is to be performed on one side within the year does not require to be in writing under the statute.

We have now got thus far, that an agreement is not within the statute if it is in terms to be or is capable of being completely performed on both sides within the year; that if the agreement cannot be performed within the year or the parties contemplate its performance to extend over a greater period of time than a year, the statute applies; that if the agreement is in terms to be executed by one party within the year the statute does not apply. Does it or does it not apply if the agreement is merely capable of being performed by one side within the year? Let *Reeve* v. *Jennings*, 54 S. J. 635, answer. In this case the defendant, a dairyman, entered into the plaintiff's service upon an oral agreement which was to be terminable by either party on

one week's notice in writing, and the defendant bound himself not to carry on the same business within a radius of four miles for three years after the determination of the service. After serving nearly two years the defendant left the plaintiff's service and started business within the prohibited radius. The plaintiff applied for an injunction, and to the plea of no writing urged that the contract was capable of being performed within a year by him, and thereupon writing was not necessary. But the Court was disinclined to give a wider operation to the statute than it could help. It distinguished *Donellan* v. *Read,* on the ground that the contract in that case was intended by the parties to be performed on one side within the year. In *Reeve* v. *Jennings* there was no such intention, though the plaintiff might have terminated the defendant's engagement within the year, when it would, of course, have been completely executed by him. But the contract did not shew on the face of it any such intention and consequently it was within the statute.

An interesting point is that decided a few months ago in *The Prested Miners' Gas Co.* v. *Garner* (54 S. J. 750), where the parties entered into an agreement for the sale of goods which was not to be performed within a year. There was nothing in writing, but there had been part acceptance within sec. 4 of the Sale of Goods Act, 1893. The point was whether the contract was governed by both statutes or whether the latter only applied. It was held that the agreement fell within both statutes. Consequently in the absence of writing no action could be brought, notwithstanding that the provisions of the Sale of Goods Act were satisfied. It was contended that sec. 4 of the Statute of Frauds did not apply to an agreement for the sale of goods, but the Court decided otherwise.

OBSTRUCTION OF VIEW.

A case which presented some aspects not covered by previous authority was recently decided by the Divisional Court of King's Bench in *Campbell* v. *Mayor, Aldermen and Councillors of the Metropolitan Borough of Paddington* on an appeal from the Marylebone County Court. The plaintiff was the tenant of a house in Burwood Place, Edgware Road, in which she was in the habit of letting seats, in rooms

which had windows facing Edgware Road, to persons who wished to view processions passing down that road. One Ginger offered her £40 for the use of a balcony on the first floor, and £20 for the use of two windows on the second floor for the purpose of viewing the funeral procession of His late Majesty King Edward VII. The offer was accepted and £20 paid on account. The defendant council passed a resolution authorising its Works Committee to erect a suitable stand capable of accommodating the council and their friends, the cost thereof to be borne by the members. A stand twenty-nine feet in length and width, with a height of from four feet in front to eleven feet at the back was erected, and when completed proved to be a serious obstruction to the view from the plaintiff's windows. Before its completion Ginger asked to be released from his contract to take the first floor, agreeing to keep the second floor; and the plaintiff consented to release him as desired. She subsequently brought an action in the Marylebone County Court claiming damages for obstruction of the use and enjoyment of her house.

The County Court Judge directed the jury that the prospect of letting seats to persons who desired to view processions was an incident to her occupation of the house shewn by the evidence to have a considerable pecuniary value; and that she was entitled to damages if anyone by means of an unlawful obstruction on the highway deprived her of her prospect of letting rooms. He also told the jury that the act of the defendants in authorising the erection of the stand was illegal; and that if the plaintiff had sustained any special loss from that act beyond the inconvenience common to the general public, the defendants would be liable to the extent of that loss. As to damages he directed that the jury could take into consideration the loss sustained by reason of the plaintiff releasing Ginger, as she would not be bound to insist on the performance of his contract if the defendants' act prevented her from giving him the accommodation for which he had contracted. The jury returned a verdict for £90, for which sum judgment was entered.

Three grounds were put by counsel for the appellants. In the first place it was urged that no right of the respondent was infringed by the appellants' act. There was no such right known to the law as a right of view. Secondly,

as Ginger had been voluntarily released by the plaintiff, she could not make the appellants pay his debt. In the third place it was contended that as the appellants had not themselves erected the stand, and were not capable of authorizing the erection of a public nuisance, they were not liable. For the respondent it was conceded that a view from the windows of a house was not an easement or right in the nature of an easement; and that if a person by an innocent act obstructed the prospect, no action would lie. It was argued, however, that inasmuch as the erection of the stand was a wrongful act, the loss caused thereby was recoverable; and as to the second ground, that the respondent had acted reasonably in releasing Ginger, while as to the third, the appellants' arguments would exempt corporations from any liability for torts.

The Court (Avory and Lush, JJ.) dismissed the appeal. On the main ground, Avory, J., agreed that the law did not recognize a view or prospect from a house as a right in the nature of an easement which could belong to anybody as of right; and that no period of enjoyment would give a person a right of action against another, who on his own land erected a structure or planted trees which obstructed the view. But this was the case of a person not in the exercise of any right, but unlawfully and without authority erecting a structure in the public street which seriously interfered with the enjoyment by the plaintiff of her house. Moreover, the wrongful act of the appellants constituted a public nuisance. The plaintiff had lost tenants who would have occupied for one day as the direct consequence of this public nuisance; for the jury must be taken to have found that there were persons who would have taken the rooms, but who, on seeing the obstruction, refrained from taking them. Ginger had claimed to be relieved of his contract, and the plaintiff, as she was bound in equity and morals if not in law to do, relieved him of his obligation, and lost what she would have received from him and other persons as well.

Lush, J., dealt with the contention, that since the act of the defendants was illegal, the only persons who could be sued in respect of it were the individuals who authorized it. Cases had been cited in which it had been held that a corporation was not liable for wrongful acts of its servant done without instructions or authority; but these only illustrated the principle that where a wrongful act was done without

authority, that authority could not be implied if the act was outside the statutory powers of the corporation. That principle had no application where the corporation had resolved to do and actually had done the unlawful thing. The act which caused the damage, no matter for whose benefit it was done, was the act of the corporation and not of the individual councillors. The main point was very clearly put by Lush, J.: "The defendants begin with an act wrongful in itself; if such an act is the source and origin of loss to the plaintiff, then provided the loss is sufficiently closely connected with the wrongful act, it is a loss for which the plaintiff is entitled to redress. There are many cases of wrongful acts causing the loss of the enjoyment of a benefit which could not be enforced, where nevertheless it has been held that damages are recoverable. It is well settled that an action of slander may be brought to recover special damage for loss of the hospitality of friends, yet a person has no right to that hospitality in the sense that he can compel his friends to entertain him, or in the sense that they do him a legal wrong by omitting to do so. Again, if a slander causes persons to withhold contributions which they were in the habit of making, an action may be brought although the plaintiff had no legal right to the contributions, in the sense that if they were withheld a right of his would be infringed by the contributors; though as against innocent persons he has no right, yet as against the slanderer the loss of contributions is special damage sufficient to sustain an action. The present case is exactly analogous. The plaintiff was in the enjoyment of a benefit which no doubt she could not enforce; but the moment the defendants by their wrongful act of obstruction deprived the plaintiff of that benefit, they caused her particular damage which was the direct result of their wrongful act. No doubt the damage in order to be recoverable must be the direct result of the wrongful act. But in this case it clearly was. Therefore these facts, the public nuisance, and as a direct consequence thereof, the loss to the plaintiff of a benefit which she would otherwise have enjoyed, furnish all the materials necessary to constitute a cause of action."

The instance referred to by Lush, J., of loss of hospitality by reason of slander giving rise to cause of action was settled as far back as 1807, in *Moore* v. *Meagher,* 1 Taunton, 39. The plaintiff's declaration was that she had always

been a virtuous, modest and chaste subject, and until, &c. . . . enjoyed the society, conversation, friendship and countenance of many worthy and estimable subjects of this realm (naming them) . . . and was by divers of those persons (naming them) received and entertained in their respective houses, and found and provided by them respectively with meat and drink gratuitously . . . to the great reduction of her necessary expenses of living . . . and the great increase of her riches . . . and that the defendant, well knowing the premises and envying the happiness of the plaintiff, &c., spoke the words complained of. The Court of Exchequer held that the action would lie. A more modern case to the same effect is *Davies* v. *Solomon*, L. R. 7 Q. B. 112. Of the other class of cases to which reference was made, where voluntary contributions of a congregation were withheld in consequence of slander, Lord Kenyon in 1799 decided in *Hartley* v. *Herring*, 8 T. R. 130, that such a declaration afforded a good cause of action. The point which according to Avory, J., was not directly covered by authority, was whether the principle that a cause of action for special damage arising from a public nuisance, beyond the general inconvenience, could be applied to the facts of the present case. Inasmuch as the plaintiff had lost prospective tenants directly in consequence of the obstruction of the view caused by a public nuisance, he held that she was entitled to succeed upon this ground also.

EMPLOYMENT AND REMUNERATION OF DIRECTORS.

The publication of the full report of the judgment of the Court of Appeal (1911, 1 Ch. 618), *Bath* v. *Standard Land Co.*, makes it worth while to examine in detail the grounds on which the decision of the majority was based? The plaintiff was adjudicated bankrupt in 1893, but he had land of considerable extent in Kent, the value of which he believed to exceed his liabilities, and in April of that year he entered into an agreement with the Creditors' Assets Co., that they should provide the money required to pay his debts and should take over the management and realization of his property. The agreement regulated the terms on which this should be done, and any profit made after repay-

ment of the company's expenditure was to be divided in certain proportions between the plaintiff and the company. In 1905 the company was reconstructed under the name of the defendant company, and the defendant company continued the management of the plaintiff's estates under the agreement of April, 1893. That agreement provided that accounts should be kept by the company, and one of the points decided in the present case was that the company could not charge against the plaintiff a special salary paid to its secretary for keeping these accounts. But the agreement did not provide that the remuneration of the company should include the rendering of services, which were not within the company's functions, such as services of solicitors and auctioneers, and if the persons employed in these capacities in connection with the management and realization of the estates had been totally distinct from the company, it seems to have been assumed that their remuneration would have been properly charged against the plaintiff. But in fact the company employed certain of its own directors, and it was contended on behalf of the plaintiffs that the directors were in a fiduciary relation to him, and were therefore debarred from making any profit.

This argument Neville, J. (1910, 2 Ch. 408), and in the Court of Appeal, Moulton, L.J., rejected: so that in point of number the judicial votes are equally divided; and there is direct authority for it in the decision of the Court of Appeal in Ireland in *Kavanagh* v. *Workingman's Benefit Building Society* (1896, 1 I. R. 56). Neville, J., identified the directors with the company and held that charges which the company itself could not make, could not be made by the directors. The agreement regulated the remuneration of the company, and had the company rendered the services in question no additional charge could have been made; and the directors in rendering the services were in effect themselves the company. "The board of directors," said the learned Judge, "are the brains and the only brains of the company which is the body, and the company can and does act only through them," and, after observing that it made no difference whether the board consisted of one member or several, he continues: "I do not think if the company, acting through its board, appoints a member of the board itself to do business for someone in respect of whom the company is in a fiduciary position, that the company

can charge, as an expense properly incurred, the money so paid."

As just stated, the same view was taken by Moulton, L.J., but the Lord Justice appears to have been largely influenced by the consideration of the possibility of a sale by the company to one of its own directors, or, in the case of a single managing director, to that director. "He purchased part of the trust property for himself. Can such a sale stand? He knows that it is the duty of his company to get the best price in the interests of the *cestui que trust*, and that he is acting for his company in carrying out that duty. Can it be seriously contended that in buying it he is not allowing himself to be in a position where his interest conflicts with his duty?" The answer, of course, is that a company cannot sell to one of its own officers who is himself managing the sale, and it was so held in *Hodson* v. *Beans* (1903, 2 Ch. 647). There, on sale by a friendly society as mortgagee by public auction a member of the committee was the purchaser, and on evidence that the sale was at an undervalue it was set aside. But in such cases the function in question—namely the sale of property—is performed by the company, and the company has to account to *cestui que trust* for the purchase-price. The security for the proper price being obtained is gone if those who act for the company arrange for a sale to themselves. "If," said Lord Moulton, L.J., "such principles"—that is, that those administering a trust cannot make a profit for themselves—"are wholly inapplicable to the individuals who, in the case of a trustee company, are the persons really administering the trust, *i.e.*, the directors, and if they can use the powers which are thus in their hands to their own personal advantage without incurring any liability to the *cestui que trust*, the whole security of the position is gone."

But while this clearly applies in a case where the company sells to one of its own officers, it by no means follows that the same danger exists where the company employs one of its own officers to do some incidental work, which the company cannot do itself, and upon this distinction the decisions of the majority of the Court of Appeal was based. Buckley, L.J., referring to the case of the solicitor-director, observed that where the defendant company employed him as solicitor, it was employing him to do for the trust, an act which the company could not do, for the company was not a

solicitor, and the profit costs which the solicitor-director might receive were not, and could not be, received by the trustee. Similarly the Master of the Rolls observed that the profits in question were not in fact received by the company, but were received by the director. The work was work which had to be done by some person; it could not be done by the company; and hence it was proper for the company to employ and pay a third person. In the case of the sale just referred to, the same person is in effect buyer and seller, and the *cestui que trust's* interests are endangered. In the case of an agent employed to do work which the trustee company cannot do, no such consideration arises. The company, indeed, owes a duty to the *cestui que trust*, not to employ a solicitor unnecessarily, and not to pay him too large a remuneration; but that, in the present case, was a duty solely between the defendant company and the plaintiff. "If" said Buckley, L.J., "the corporation wrongfully employed (the solicitor-director), or paid him excessive sums, the corporation, of course, are liable to Mr. Bath for any breach of duty as between these two parties. But if it properly employed a solicitor and paid him proper sums, why should the solicitor be deprived of the payment for services which the corporation could not render and which have been properly rendered, or why should the corporation be disallowed the amount so paid?" The case of sale by a company to its own officer, and the case of the employment by the company of its own officer in some capacity outside the company's functions are, in fact, quite distinct, and the considerations which render a sale liable to be set aside do not operate as regards the remuneration for such employment. The officer who is employed is not in a fiduciary relation as regards his employment to the *cestui que trust*, and he is entitled to receive and retain his remuneration: moreover this remuneration is not profit which comes to the hands of the company so as to render the company liable to account for it. If the cases of a sale and of the employment of a director for independent duties are kept distinct, the decision seems to present no difficulty.

CONTEMPT.

The case recently before the High Court of Australia, in which Henry Richard Nicholls, editor of the Hobart *Mercury*, was charged with having caused to be printed and published of the Hon. Henry Bournes Higgins in his capacity as a Judge of the High Court of Australia, an article containing words which were said to reflect upon Mr. Justice Higgins, has given prominence to a question that has for a long period, at any rate in the Courts of Law, received no public attention. It may prove instructive to review briefly the history of contempt as applicable to the case referred to. In its legal acceptation the term signifies disrespect to that which is entitled to legal regard, and in its origin all legal contempt will be found to consist of an offence more or less direct against the Sovereign himself as the fountain head of law and justice, or against his palace where justice was administered. As an illustration of this an old case mentioned in 5 Vin. Abr. tit. "Contempt," p. 442, citing 24 Edw. III., ch. 33, says: "J. of F. went armed in the palace which was shewn to the Council of the King, by which he was taken and disarmed before Justice Shard and committed to the prison of the Marshalsea, and could not be bailed till the King had sent his will." The technical or legal expression contempt of Court has, however, departed from its primary meaning of contempt of the King, his person, government, or prerogative, and is now understood in its secondary or derivative meaning of an offence against the Courts or persons to whom the judicial functions of the Crown are delegated. Attempts have from time to time been made to give a definition of contempt of Court, but such definitions are scarcely sufficient, owing to the manifold aspects of the subject. In Viner's Abridgment (tit. Contempt) it is defined or described as a "disobedience to the Court, an opposing or a despising the authority, justice, or dignity thereof. It commonly consists in a party doing otherwise than he is enjoined to do, or not doing what he is commanded or required by the process, order, or decree of the Court." Sir William Blackstone defines it as follows: "Contempt is a disobedience to the rules, orders or process of a Court or against the King's prerogative." It will be seen at once that these definitions are not sufficiently wide

to cover all the acts that may be dealt with as acts of contempt, and recognising this we find Judges endeavouring to classify the various kinds of contempt rather than to define the term itself. Thus Lord Chancellor Hardwicke in the case of the *Printer of the St. James Evening Post* (1742 2 Atk., p. 471) said: "There are three different sorts of contempt—one kind of contempt is scandalizing the Court itself: there may be also a contempt of this Court in abusing parties who are concerned in cases here: there may be also a contempt of this Court in prejudicing mankind against persons before the cause is heard." And he adds—"There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."

The latest definition of contempt of Court is to be found in *The Laws of England* by the Earl of Halsbury, vol. 7, p. 280, where, treating of contempts of Superior Courts of record, he says:—"Contempt of Court is either (1) criminal contempt consisting in words or acts obstructing or tending to obstruct the administration of justice; or (2) contempt in procedure, consisting in disobedience to the judgments, orders, or other process of the Court, and involving a private injury." Under his first subdivision he includes Lord Chancellor Hardwicke's first kind of contempt, "Scandalising the Court itself." Within this class of contempt the article by the editor of the Hobart *Mercury* was alleged to come. The underlying principle of this class of contempt is an interference with the clear and pure administration of justice. The process of the Court is not to be invoked merely for the vindication of the Judge as a person. He must resort to action for libel or criminal information. To use the language of Griffith, C.J., "Judges are not sacrosanct." While then there is in the hands of the Court this weapon, still it is a weapon that is to be used sparingly and always with reference to the interests of the administration of justice. To quote Lord Russell, C.J., in the case of *The Queen* v. *Gray*, 1900, 2 Q. B., at p. 40, "Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is

to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen." To such an extent had the principles, expressed by Lord Russell, C.J., come to be recognised, and so sparingly had the Courts used the power they undoubtedly possessed that only in the year prior to that in which the case of *The Queen* v. *Gray* was decided, Lord Morris in delivering the judgment of their Lordships in the case of *McLeod* v. *St. Aubyn*, 1899, A. C., at p. 561, said that punishment for contempt was a summary process, and should be used only from a sense of duty and under the pressure of public necessity, for there could be no landmarks pointing out the boundaries in all cases. Committal for contempt of Court by scandalising the Court itself had become obsolete in England. Courts were satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of Court for attacks on the Court, might be absolutely necessary to preserve in such a community the dignity of and respect for the Court. In all cases of this kind then the only question to be asked and to be determined appears to be, "Are the words complained of calculated to affect the course of justice or the administration of the law in the particular Court alleged to be affected?—a question of fact to be decided according to the circumstances of each case. Comparison may be made between the facts of the case in the High Court, and those in the leading cases in the reports to some of which reference was made during the hearing of the former. In the case of the Hobart *Mercury* the article complained of referred to an episode which took place in the Arbitration Court, and commented upon a reference by the Judge to "those above us." The judicial proceeding to which the reference was made was at an end, and the words were, if objectionable at all, an unjustifiable criticism upon the Judge as a person, and accordingly a fit subject perhaps for libel, but not for committal for contempt as in no way interfering with the course of justice. It is only right to say that the respondent in this case expressed his regret for having used something which was capable of being construed into a disrespectful comment, which he did not intend. In the case of the

Bahama Islands, 1893, A. C. 138, the editor of the *Nassau Guardian* was committed for contempt, in that he allowed to be published in his paper a letter criticising in sarcastic terms the conduct of the Chief Justice, and in effect imputing that he was a fool. The letter held up the Chief Justice to the grossest ridicule, represented him as a man incompetent to do his work, and as one who shirked his work, and suggested that it would be a providential thing if he were carried off by fever. The report of eleven members of the Judicial Committe was that, though the letter might have been made the subject of proceedings for libel, it was not in the circumstances calculated to obstruct or interfere with the course of justice or the due administration of the law, and therefore did not constitute a contempt of Court. The next reported case is that of *McLeod* v. *St. Aubyn,* 1899, A. C. 549, in which the appellant had been committed by the respondent for a contempt in publishing a newspaper called the *Federalist,* wherein were a certain letter and article, both of which contained a scandalous and defamatory attack upon the integrity of the Court. The appeal was allowed and the committal quashed on the ground that the appellant was not the printer or publisher of the paper and that he was quite innocent of its contents, but in the course of the judgment Lord Morris said that proceedings for contempt were not to be used for the vindication of the Judge as a person. Committal for contempt of Court was to be used always with reference to the interests of the administration of justice. Hence, when a trial had taken place and the case was over, the Judge or the jury were given over to criticism. The last case to which attention may be directed is that of *The Queen* v. *Gray,* 1900, 2 Q. B. 36. The facts are briefly as follow. One Wells was about to be tried before Darling, J., for unlawfully and indecently publishing and uttering certain obscene and filthy words and for unlawfully publishing and selling an obscene libel contained in a book. Before the trial commenced Darling, J., made some observations in Court, pointing out the inexpediency of the press giving anything like a full account of what passed at the trial. After the trial of Wells, which resulted in his conviction, had been concluded and sentence passed, and whilst the Judge was still sitting as one of Her Majesty's Judges of Assizes, Gray wrote and published in a newspaper the article in question. In the language of Lord

Russell, C.J., the article was one of scurrilous abuse of a Judge in his character of a Judge—scurrilous abuse in reference to the conduct of the Judge while sitting under the Queen's Commission, and scurrilous abuse published in a newspaper in the town in which he was still sitting under the Queen's Commission. The Court held that Gray was guilty of a contempt. It will be noticed that though, as Lord Morris said in the preceding case, when a trial is over the Judge is given over to criticism, nevertheless Gray, to whom this condition applied, was committed, because the Court considered that his conduct amounted to an interference with the course of justice. Generally, however, it may be said that, provided the comment is fair, when once a trial is concluded the liberty of the press to comment upon it is unimpaired.—A. T. L.

STRIKES AND TRADE UNIONS.

This paper will deal briefly with what are known as trade unions in their relations to strikes. In England and in Canada many laws have been passed to protect labourers against the oppression of employers, and it is partly owing to the inequality of capital and labour that trade unions are formed, their chief object being to withhold labour from the market in times of urgent pressure until remunerative prices are offered. It must not be forgotten that while some strikes are perfectly justifiable in order to enforce honest and just demands, others may be resorted to in order to extort unreasonable exactions or enforce tyrannical rules; and it would seem that the only corrective against such attempts is to be found in the freedom of the labour market, which in many cases it is the purpose of these combinations among others to prevent. Many persons rarely understand what the meaning of the words "trade union" is. These unions are rarely heard of by the public except in times of strike, and because of this fact many people suppose that their principal function is the promotion of strife; but in point of fact their objects are mainly peaceful, and in respect of benevolence and utility they are entitled to high rank. It has been said that if they did not exist they would have to be invented. Usually the objects of trade unions are twofold:—first, they operate as a friendly and benefit society, and

secondly as a trade society or guild. The leading aims of trade unions are to suppress sweating, exclude the competition of the foreign labour market, increase wages, shorten the hours of labour, and secure a more equal distribution of work among the workmen in any given trade than would be the case under the *regime* of unrestricted competition. Hence their rules prescribe a minimum amount of wages, and a maximum amount of work to be done by their members, and prohibit piece-work or working overtime.

The direct method of effecting these objects is by strikes, the indirect by limiting the number of the workmen to be employed, and discountenancing competition among those who are actually employed. Most of the unions strenuously resist the employment of non-unionists, or "black-legs," and strive to exclude them entirely from work. It is their policy to extend the area of their influence by means of branch associations throughout the country. As a matter of fact recent investigation has shewn that there is a loose sort of connection and cohesion between the unions of all trades. It is not the purpose of this discussion of trade unions to deal with the commercial side of the question, but simply to shew what the objects of a trade union are, as in a later paper the legality of certain acts of trade unions in regard to labour disputes will be dealt with.

Trade union law in the main is now chiefly a code for the regulation and direction of the affairs of the unions internally. The right of trade unions to exist at all rests on the Acts of Parliament legalizing such combinations at the present time. In Canada trade unions are governed by the Trade Unions Act, chapter 125, R. S. C. 1906. That Act is divided into several parts dealing with the interpretation and application of the Act, the constitution and registry of trade unions, also with the annual statement and manner of dealing with the property of the union, the procedure to be adopted in the various actions and suits at law brought by or in connection with a trade union, the manner of accounting with regard to the funds and property of the union, and various other matters therein set forth. By sec. 32 of that Act it is declared that: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecu-

tion for conspiracy or otherwise, or so as to render void or voidable any agreement or trust."

This statute removes the common law disability of combination to raise the price of labour and to establish the conditions of labour. Under this Act labour may organize to regulate wages, the hours of labour and the conditions of labour, and for the protection of individual rights in the prosecution of labour, but such an organization as is allowed to exist by virtue of the Trade Unions Act cannot be employed to injure property or for the oppression of others or to harm the public welfare. Section 2 of the Act defines the meaning of the words "trade unions" as follows:—It means such combinations, whether temporary or permanent, for regulating the relations between workmen and masters or for imposing restrictive conditions on the conduct of any trade or business as would but for this Act have been deemed to be an unlawful combination by reason of some one or more or its purpose being in restraint of trade." This section, together with section 32 before referred to and the various sections of the Canadian Criminal Code to be hereafter discussed, comprise the law which regulates labour and strikes in Canada to-day. In addition to these three things another Act called the Industrial Disputes and Investigation Act must not be lost sight of, as it stands in a class by itself and governs all labour disputes, including strikes, until certain conditions therein stated have been complied with. This latter Act will receive special attention in another paper.

The chief objection to trade unions is the regulations which some of them have regarding the exclusion of non-union men from employment, the exclusion of women and children, the limitation of the amount of work to be done by each workman, by the hour or day, the prohibition of work done by the piece, the limitation of the number of apprentices by the ratio of workmen engaged in each factory, and at other times by the inhibition of improved machinery.

Most of the objects of trade unions as a rule are praiseworthy, such as providing for sick or disabled members, and in the case of the death of a member or of his wife some unions usually provide the burial if the man is too poor to bear the burden, and in other cases when workmen are out of employment if they wish to emigrate to some other country they are assisted in doing so by the union.

But it must not be forgotten that in all trades these unions exercise a dominating influence in questions affecting the interests of the workmen growing out of contracts with employers; and in case of strikes very commonly non-union men place themselves under their leadership. The non-union men are made up of workmen of unusual skill who will not accept the maximum of wages prescribed by the unions, inferior workmen not capable of earning the prescribed wages, the idle and the vicious who will not pay the dues required, and others who from temperament object to associations of that kind.

Trade unions are not all alike. They differ as individuals do. But these are the main objects for which they are created. By enabling large bodies of men to act as a unit, they overcome in a measure the inequality that otherwise would exist between them and their employers. Their funds are derived from weekly contributions, special assessments, occasional fines, and profits accruing from their investments. If their reserve fund increases they enlarge the sphere of their usefulness among their members in many ways. But as peace is the time to prepare for war, they strive always to keep on hand money enough to meet the emergency of a strike.

In a few of the unions a special fund is collected and set apart for this latter purpose, never to be used for any other. This leads to a spirit of defiance and jingoism; for, since the money can only be used for a strike, strikes must be resorted to in order to dispose of it. But most unions have no such separate fund. They know the bitter evils and privations attending a strike as well as others, and they are averse to measures that so thoroughly impair the usefulness of their ordinary operations; though from passion and recklessness strikes often occur without any reasonable grounds. The general result is that the unions lessen the number of strikes, but make them last longer when they do occur. Formerly strikes were temporary raids or skirmishes. At present they are military campaigns, conducted with skill and judgment. Their greater chance of success is on a rising market. With a falling market they almost invariably fail.

Toronto, Sept., 1911. R. A. Reid.

THE MISSION AND OBJECTS OF PHILOSOPHY OF LAW.

In the ages some several hundred thousand years ago, before man became a prominent figure in the world, his whole life was a struggle for existence with the ferocity of the animal kingdom and the disfavour of nature. Man was not then the master, but the slave. He was fortunate if he could sustain life in this conflict among many mortal enemies.

What a marvellous change has come about! Man is now master of the earth; he has vanquished all that is gross and inferior; he has even conquered the air, and measured the paths of the stars. Man's victory over nature is due to two things aside from his mental capacity: his social nature and his religious intuitions. As language and religion are characteristic of man, so has his social coherence been everywhere the factor that has given him protection against his enemies. His dominion over the earth is, however, also referable to his religious conceptions.

The newer investigation has lightened the mystic course of the thought of primitive peoples. The thought of a primitive people is properly speaking not thought at all; that is to say, not in the sense of contrasting subject and object. This mental process is one which implies coincidence with the world. The individual feels in himself what is felt in nature; and whatever is felt in nature, he feels in himself. His perception of religion, which is of a kind peculiar to primitive man, is that of an unconscious oneness of the outer world. When primitive man identifies himself with a totemic animal, the totem ceases to be for him something external, but becomes internal. His spirit dwells within him and apart from him. Indeed, he knows no difference between near and far. He is God, and God is he. God is the soul of the totem, and lives in him and beyond him.

But, just here, objective reality, little by little, breaks in. Humanity as a whole no longer is in accord with the forces of nature; this association now belongs to the magus or the shaman. Humanity steps back from nature, and the contrast between subject and object becomes more and more visible. Man, however, is still bound to the All; but this tie has ceased to express coincidence of being and now denotes a

change and a becoming. The individual does not further identify himself with the external world in the primitive sense. His soul ranges throughout the gulfs of nature; it is now within, and now without him. Likewise, the soul of God wanders through the All, and finds its seat and abode now here, and now there.

A consciousness of dualism now possesses the individual. The bond of surrounding nature is broken. The feeling of a unity of the living world, however, persists. Man himself remains in association with the spirits of the external world and is in a position to influence them. His worship and his offerings are determinative; his prayers become commands. Amidst his superstitions he arises to investigation, and while making requests of the spirits, he also notes the orderly processes of nature. Following this course, he seeks and searches more and more. His activity leads continually to new problems of investigation, and then finally to the attainment of experiment. On the other hand, the wandering of the soul and the shifting abode of God become the material of myth and fable. Mythology now populates the heaven of the gods, and fable and legend produce creations which still satisfy the demands of primitive religions, but which attain more and more a meaning, as forms of the beautiful. This is the origin of art.

We see man, therefore, in three aspects: ruling, apprehending, and creating. What was primitively one faculty has separated into these three functions. Technical skill, science, and art are the three great evidences of human activity. To dominate nature, nature must be understood. If the forms of nature are known, new forms can be made and the world of creation may be enlarged.

What avail is the domination of the world if the spirit does not penetrate its internal nature? To what purpose is knowledge, if the heaven of the gods remains empty, and poetry is dumb, and art is blind? To what end, if new forms are not made to rival the creations of nature? We need a world of ideality which shall be the counterpart of the world of reality.

Section 2.

Those who raise questions as to the meaning of cultural attainment (*Kultur*) in the sense of philosophy of law may be referred to what has been said about it. If they do not yet

know what culture is, then I have no quarrel with them. They shew by their own words their incapacity for the task of philosophy of law. Whoever regards as trivialities the great truths of the struggle for civilization manifests that he has not looked into the depths of thought. *Habeat sibi.*

The individual has never been the support of great achievements, but rather humanity as a whole, through social co-operation, has always been the source of conspicuous accomplishment. Therefore, when one speaks of law, it cannot be brought into relation with individuals, but can only be thought of in connection with the totality of human exertions. At this point we reach the level of the great Hegel. It was he, more than any other man, who forcibly brought to acceptation that human society with its complexity of thought, is the sub-soil of the world-compelling idea; and that the development of this idea—a constant refining and ennobling process—involve a growth which influences all mankind, even though perchance it may not manifest itself in the life of this or that individual. The *Naturrecht* view and the Kantian doctrine are accordingly overthrown.

SECTION 3.

The criticism that my *Lehrbuch der Rechtsphilosophie* lacks a philosophical foundation offers a reproach accompanied by an utter absence of philosophical knowledge. The slightest acquaintance with Hegel discloses the evidence of the groundwork of his philosophy in his *Encyclopædia* and his *Phaenomenology of the Spirit,* both of which have been so excellently presented by Lasson, in such clearness and completion, as to make any review here not only unnecessary but even unbecoming. If, however, it still is necessary to speak of what is at the bottom of life, of the drift of civilization, and the influences on culture of our system of legal order, then under this constraint I shall repeat what I have already said on this subject.

The fact that man creates new forms, that he rules the world, and that he understands everything as a second godhead involves the deification of humanity. The promise ascribed by an ancient wisdom to the serpent in the Garden of Paradise is to become a reality. The meaning, however, of such a result in the highest stages of a world-fate is not subject to proof and can only be surmised. In the face of

such conjectures, metaphysics must finally pause. That which for the time being exceeds our powers cannot be carried to the limits of execution; at any rate, the ultimate cannot be reached in the present state of our knowledge. To ask of the philosopher the impossible is to compel him either to offer a fantastic substitute for metaphysics or to renounce it altogether. Even though it is not possible to know everything, yet we are able to say that cultural progression means a deification of human life along the lines of science, mastery of the world, and art. Just as the oriental tree sinks a branch in the earth whereby a new tree springs up, so a second godhead arises in humanity.

SECTION 4.

Law plays its part in this cultural evolution. But, what is law? It has been asserted that my book on philosophy of law contains no definition. The moderns do not generally give definitions in the old pedagogic way. Definitions are now characterizations. Many such are found in my book (*Lehrbuch der Rechtsphilosophie*). Thus on page 2, No. 6: "Human culture is conceivable only where an order governs humanity which gives each one his position, which assigns to him his mission, and which provides for the protection of existing advantages and furthers the creation of new advantages."

Thus also on page 39: "Law is the standard of conduct impressed upon individuals, which arises from an internal impulse of the community toward a rational form of social life." The character of law is, therefore, clearly indicated and distinctly sketched. It is, therefore, made plain that law involves standards which are impressed upon individuals: and, indeed, because the rational, that is to say, the cultural order of social life, responds to an internal inclination of humanity. Law is distinguished, therefore, from custom and usage. It creates compulsory standards, as opposed to the commands of custom which relate only to the social amenities and do not involve the possibility of any condition in the community that may be forcibly protested. Law is distinguished from morals (as I have explained in *Helmolts Weltgeschichte,* and in my *Lehrbuch des Burgerlichen Rechts,* I., 13) in this, that morals do not rest on ideas of social order, but upon conceptions of a hyper-social order

which towers over the social order. Morals, therefore, relate not only to external conduct, but also touch the internal inclinations of men.

SECTION 5.

The interrogation has also been put, what mission has law in cultural evolution? I have frequently stated, that it is the mission of law not only to minister to an existing state of civilization, but to clear the way of social progression by such a system of rights, and a common possession of cultural attainments to protect them, that the obstructive elements impeding this advance will be pushed aside, and that exertions leading to this forward movement will be sustained and promoted. The evolutionary character of law is thus indicated. Our civilization is not a thing benumbed. Like an organic creature, it discloses a never-ceasing struggle toward greater unfoldment.

Law, therefore, has the function of creating the conditions in which humanity may exert a cultural locomotion. These conditions are not limited by an existing civilization, but assume that human culture is a state of constantly becoming, and changing. Law provides the means of participation of mankind in the advance of this cultural progression. Everything is in a state of flux and continues in a state of flux. It is self-evident that no permanent ideal is possible. Every present carries its unattained ideal. These ideals are equally as various as the differences of cultural attainment in different ages. Every age has its fixed cultural advantages, and every age also has its definite ideals of the future. In the time of Dante not only the existing civilization but also the ideals of what social development should bring forth, were different than in the time of Goethe, or in the present day.

SECTION 6.

The extraordinary relativity of law admits of an *a priori* determination as to only one thing, namely, that law is the creation of cultural attainment and that its purpose is to maintain and further this culture. This relativity of law leads to the conclusion that a philosophy of law in the older sense—implying certain given independent leading principles

which are valid for all times—is not possible; but that such leading principles are rather contrary to the meaning and mission of law.

The things that philosophy of law can and should accomplish are:

1. It should shew the relation of law to cultural development and should exhibit this relation in the various institutions of the law. This is the factor of the history of civilization.

2. It should develop the possible influence of law in civilization. This suggests what was previously wholly disregarded, that law, like other products of cultural attainment (as, for example, religion), operates through the soul of humanity. Philosophy of law, therefore, must investigate the soul of mankind (*Volkerseele*), for only in this way is it possible to know how the impulse of law operates upon it, and what things obstruct or advance this impulse. By this method alone is it possible to understand how a fruitful idea frequently may be diverted from its proper course, or temporarily be crushed, due to pathological conditions or acute stagnation of the soul of humanity. This is the element of ethnological psychology.

3. The sociological view attaches itself to the consideration of ethnic psychology. It shews that here as in all organic entities the relation of the individual to the whole, and, therefore, the relation of individuality to unity, are authoritatively determined. In the progress of law there is no more important factor than the perpetual strife between the activities of the individual and the repression of the community. The whole subject of community and individual ownership, the law of obligations, and, foremost, the study of the position of the individual in the state in the domain of public law, exhibit the tremendous importance of this opposition.

4. This psychologico-sociological evolution is reflected in history. Humanity exerts itself in the realm of facts or history, not simply like a totality of physical forces, but it operates coincidently as emanation of the supreme idea. It will hardly be necessary to develop or motivate the Hegelian doctrine of idea. The pantheism of history is the certain product of philosophical investigation. I have no quarrel with those who are ignorant of the achievements of Hegel and Nietzsche in this connection.

It is the peculiar quality, however, of history that the apparent adventitiousness of becoming is nothing other than the expression of supreme being. It follows that mankind will, as it may, must at last bend toward certain ends. This is demonstrated in history in general, and also in the history of law. The knowledge of this unconscious striving to certain ends in the history of law is a further mission of the philosophy of law. It may be denominated the historico-philosophical object of law.

5. The final metaphysical object of philosophy of law was indicated above (section 3). Pantheism embraces the world as a temporal unfolding of the Supreme Being and the attainment of a broader and loftier godliness. This evolution must be mirrored in the law.

SECTION 7.

In the above exposition I have covered, I believe, the objects of modern philosophy of law. These objects, as pointed out, are the history of civilization, ethnic psychology, sociology, philosophy of history, and finally metaphysics. The institutions of society are to be investigated and explained from each of these standpoints. This exposition is naturally best accomplished by the historical method, inasmuch as the cultural, the ethnico-psychological, the sociological, and the historico-philosophical advance of law, attain expression in history concurrently. Philosophy of law without history will be wanting in the tangible materials which philosophy cannot dispense with, if it is to avoid losing itself in the gray mist of abstraction.

A fundamental error that has resided in philosophy of law up to this time is the view that has regarded law as something fixed and not in a state of flux, and has disregarded history. This view has even gone to the extent of holding that an acceptance of law as something variable was opposed to philosophy of law. The chief faults of Hegel's philosophy of law proceed from these errors; and if, notwithstanding a deficiency of knowledge of the history of law, Hegel, has to so great an extent found the truth, this must be attributed to the genius of his intuition which supplied the want of positive knowledge.

JOSEF KOHLER.

THE PRIVY COUNCIL.

Viscount Haldane, in moving the second reading of the Appellate Jurisdiction Bill, said the problem of how to put the appellate jurisdiction of the Empire on a proper footing would never be adequately solved until there was a real supreme Court of Appeal for the Empire. Without going full length what they now proposed to do was to lay the foundations for what was virtually and in substance a single Court of Appeal for the whole Empire, although it could sit under two forms—at times as the House of Lords Court of Appeal and at other times as the Judicial Committee of the Privy Council. At present the appellate business of the Empire consisted of two parts—the appeals that came from the United Kingdom, which numbered 100 in each year, and the appeals from the Dominions, the Crown Colonies, and the Channel Islands, which formed an important but a smaller part of their business. In 1910, he thought, there were 78 of those appeals. Of these more than half came from India, and of the remaining half rather more than half came from Canada. The work done was of enormous variety. They had now got two tribunals. The nucleus of the Judges were the four regular Law Lords, the Lord Chancellor, the ex-Lord Chancellor, and such other members of their lordships' House as were qualified by occupation of high judicial office to sit. In the Judicial Committee all of these were eligible, and in addition, under statutory powers, there were several members of the Judicial Committee who were not members of the House of Lords. The Lord Chancellor exercised great care, but it was sometimes impossible to secure that the decision of five Judges sitting in a Dominion Court of Appeal should not be reversed by three or four Judges sitting here, and the result was a good deal of misunderstanding. In this state of things the matter was brought before the recent Imperial Conference. At first New Zealand proposed that every Dominion should have a Judge of its own on the Judicial Committee, but it was pointed out that some of the Dominions had only one or two appeals a year, and to spend £5,000 or £6,000 a year on keeping a Judge here would be absurd. That was unanimously dropped. But it was agreed

that the Chief Justices or other eminent members of the Bench in those Dominions and the Colonies would be summoned when there were questions which had to be decided of a character in which local assistance was specially desirable. There were three clauses in the Bill. The first provided that the sittings of the House and of the Judicial Committee should be arranged so far as possible in such a manner as not to take place simultaneously. The second was that his Majesty might appoint two Lords of Appeal in Ordinary under section 6 of the Appellate Jurisdiction Act in addition to the four Lords of Appeal in Ordinary whom he might appoint under sections 6 and 14; and the third clause gave effect to the conclusion that it was wrong to differentiate so much as had been done between the salary of a Lord of Appeal and that of a Judge of a Court of Appeal. It was thought that £5,000 a year should be the salary in all cases. He believed that the passage of the Bill would lead to a very great strengthening not only of the Judicial Committee, but of the appellate side of that House, and form the foundation on which hereafter to transform the whole into a Supreme Court of Appeal for the Empire, with uniform procedure and without the anomalies which had arisen.

Viscount Knutsford hoped a second reading would be given to the Bill. From experience of some standing he knew that great importance was attached to the provisions in the Dominions, and there were also a certain number of cases from the Crown Colonies, where the knowledge that an appeal could be made had a very great effect.

Lord Courtney of Penwith was not persuaded that this Bill was the right way of dealing with the problem to be faced. He did not agree with the proposal to cut down the salaries from £6,000 to £5,000. That was evidently only put forward as a means of mitigating the expenditure on the creation of two new and unnecessary Lords of Appeal.

The Marquess of Salisbury said that some politicians of the baser sort had used the House sitting judicially as a stick with which to beat the House as a body sitting politically. (Hear, hear.) That was, of course, disgraceful, and for that reason it became necessary for many of their lordships to say that if the impartial judicial decisions of the House were to be used for political purposes, the sooner the judicial jurisdiction was abolished the better. The noble

lord who had just spoken criticised the Bill because it provided for the appointment of two new Lords of Appeal. Whether that was a good proposal or not, very much depended on how the Government intended to carry out the Bill. He noted that it was proposed to alter the procedure of the Judicial Committee by establishing minority judgments. He did not know whether the noble and learned lord on the Woolsack and the noble and learned viscount had consulted with the noble and learned lords on that side of the House as to whether that was a desirable change. It was evidently one of vital importance, and unless there was some understanding between the two legal sides they must reserve liberty of action on this point at a future stage.

The Lord Chancellor said that with regard to altering the practice of the Judicial Committee of only delivering one judgment, or one statement of opinion, he would frankly prefer that things should remain as they were. Not only did he believe that it was better that the Court should all agree on one particular view, for the guidance of other Courts, but experience had proved its desirability. At the same time, his was the voice of one perfectly disregarded at the Conference. The representatives of the Dominions concurred in taking a different view. As these judgments affected them entirely, it was not our business to stand in the way of their preference not only for the opinion of the majority of the Court, but also for that of any dissenting critic. He hoped and was sure that dissent would be rare and very moderately expressed. With regard to the other part of the Bill, it was not only very important but rather delicate work that they had to do. The great causes that came to that House, and the others, some of which were of immense Constitutional importance, that came before the Judicial Committee of the Privy Council, were increasing in number. He was glad to say that there were no arrears, and that yesterday morning he heard that the last case had been finished in the Judicial Committee. (Hear, hear.) There was no reason to complain of any delay in that House, but the work was heavy. What one had to do sometimes was to divide the Committee into two. The only regular body consisted of the Lord Chancellor for the time being and four Lords of Appeal. Speaking for himself, he would go on as long as he could doing his best, but he declared that the time was coming and was near at hand when the com-

bination of the duties of Speaker of one of the Houses of Parliament, of a Judge of the Court of Appeal, of a member of a Cabinet which had important and momentous matters to decide, to say nothing of administrative duties relating to lunacy, magistrates, and other matters, might be too much for the strength of anybody unless it was mitigated by the lightening of the burden in some direction. That was the situation they had to face. The Colonial Premiers had given notice beforehand of resolutions from New Zealand and Australia desiring that there should be an Imperial Court of Appeal, and that it should consist of Judges from all parts of the British Dominions. They wanted the House of Lords and the Judicial Committee of the Privy Council to be fused into one. The difficulty about that was that every single self-governing Parliament was entitled to say what sort of Court it wanted. They found, as he knew beforehand, that Canada, for instance, was not prepared to say that a Canadian appeal should be heard by a South African, a New Zealand, an Australian, and an Indian Judge, and so forth; and it would be very difficult to constitute a Court which would be composed of Judges from all parts of the world. Feeling that with all this heavy and increasing work it was not quite strong enough to have a nucleus of the Lord Chancellor and four Lords of Appeal, he suggested, after conferring with his colleagues, that if they were not prepared to take Colonial Judges they should add two more of the finest Judges they could get in England, and they all fell in with the view and concurred in the resolutions which Lord Haldane had read. That was the origin and genesis of the Bill, and he thought it was a reasonable thing to do. The object of saying that the Courts were not to sit simultaneously was that, so far as practicable, they wanted the fullest strength they could get to sit for appeal, from the United Kingdom, and, secondly, to try appeals from the Dominions beyond the seas. There was the question of whether the Lords of Appeal in Ordinary ought to sit in the House. He was not particularly enamoured of their sitting there, but the criticism which had been leveled against it was that they had not delivered popular judgments, that they had brought unpopularity upon their lordships' House by doing justice. The real feeling at the bottom of the complaint was one which he thought that House, or any House might well afford to be superior to. That House lost nothing by

containing within its ranks men who gave unpopular judgments. He had not been a party to any of these judgments; had be been present he had not the least doubt he would have committed himself to some very unpopular opinions. He could therefore say this all the more freely, that he was quite certain that the opinions which had been given by the noble and learned lords who arrived at those conclusions had been the pure view of what the law required.

The Earl of Camperdown said it was undoubtedly the fact that the name of the House of Lords being attached to the highest Court of Appeal had prejudicially affected the House in the opinion certainly of the radical portion of the country. If it were possible to do so under this Bill, he should suggest that the Government should take some means of separating the House in its appellate capacity from the name of the House of Lords.

MISCONDUCT ON THE PART OF A SOLICITOR.

Unusual interest must inevitably be taken by solicitors and by members of the general public in the decision of a Divisional Court which lately suspended Mr. Arthur Edward Newton, from practising as a solicitor for a period of twelve months upon a report made by the Law Society under sections 12-15 of the Solicitors Act, 1888. The charge which had been made against Mr. Newton, and which was found to be proved, both by the society and by the Divisional Court, was laid in the following terms:—

"That the respondent, having in his capacity as a solicitor, . . . obtained access to his client one Hawley Harvey Crippen, when a convict contained in His Majesty's prison, Pentonville, abused the privilege extended to him and wilfully published through the medium of certain newspapers false statements relating to Crippen, well knowing them to be false, and further aided and abetted the editor of one of the newspapers in question to disseminate false information purporting to emanate from Crippen, whereby the public might be deceived."

Before commenting on those terms we will merely say in passing that, in view of the fact that an appeal to a higher tribunal is open to Mr. Newton—for the application

is not "a criminal cause or matter" within section 47 of the Judicature Act, 1873—we do not propose to express any opinion on the merits of the case. We will merely consider the legal questions which arise from the facts which the Court held to be proved, and as to which, as well as to such legal questions, it is open to the Court of Appeal to come to a different conclusion.

Now, the terms of the charge appear to put the misconduct on three different grounds, which, however, it does not clearly distinguish from one another. The same failure to state with precision the exact nature of the misconduct found proved appears in the judgments of the Divisional Court, and makes it somewhat difficult to appreciate the actual principle which lies behind the decision. Those three different grounds, as implied in the charge, and suggested in the judgments of one or other of the three Judges who heard the case, are as follows:—

(1) Abuse of professional confidence reposed in the legal adviser by his client.

(2) Abuse of professional privilege of legal access to a prisoner granted by the Prison Commissioners.

(3) Aiding and abetting the publication of false information relating to a convicted prisoner so as to deceive the public.

The first two grounds are strictly "professional" misconduct, but differ in a very important respect, since one is an offence against the client, while the other is an offence against the Court by whose judgment the prisoner is being held for the execution of his sentence. The third ground, however, is not "professional" misconduct at all; it seems to suggest that the respondent has aided or abetted an attempt to pervert the course of justice. Now it is of course, settled law that "misconduct" such as to invoke the disciplinary jurisdiction either of the Master of the Rolls or of the Divisional Court need not be "professional." In 1905 a solicitor who became a book-maker was struck off the rolls: *Re A Solicitor* (93 L. T. 838). Indeed it has been laid down as generally true that a solicitor will be struck off the rolls where he has been convicted, or ought to be convicted of some crime of a heinous nature: *Re Elton* (1897, 13 T. L. R. 392), and *Re Cooper* (1898, 67 L. J. Q. B. 276). The general principle has been put still more widely in the cases of *Re Blake* (1860, 3 El. & El. 34), and *Re Weare* (1893, 2 Q. B.

439); the ground there suggested is conduct, either criminal, or so dishonest or unprofessional as to unfit him to remain an officer of the Court. This vague ground is, however, a very unsatisfactory one. The only criminal offence which the facts suggest in the present case is that of a conspiracy between solicitor and editor to pervert the course of justice, but it is difficult to see how such an indictment would lie where the course of justice has been completed by the sentence of the prisoner and the affirmance of that sentence by the Court of Criminal Appeal. It is probable, therefore, that the present decision will not be relied on as a precedent to justify the suspension of a solicitor for "misconduct" which comes under the third ground. The decision must be justified on one or other of the two first grounds, where the "misconduct" alleged is of a specifically professional nature.

Of those two grounds, the first is much the more satisfactory basis, alike on reasons of legal principle and in the public interest. It is well-settled law that a solicitor must manage the business entrusted to him with fidelity and good faith; he must keep his client's secrets: *Taylor* v. *Blacklow* (1836, 3 Bing. N. C 235). He must not disclose any information given him by his client for the purpose of his case, even though unnecessarily: *Cleave* v. *Jones* (1852, 21 L. J. Ex. 105). It follows that only the express authorisation of his client could justify a solicitor in making public any comments on his own case made to him by a convicted prisoner lying under sentence of death. Certainly a bargain with a newspaper to furnish such information in return for assistance in payment of costs could only be defended on the express instructions of the client. Solicitors generally will readily recognise this principle; and all fair-minded people will admit that the profession as a whole honourably maintain in this respect a high tradition. Indeed, betrayal by a lawyer of professional confidence is extremely rare; and in one celebrated case this rule was carried out to an extent which some people have regarded as punctilious. Lady Byron had confided to her legal adviser, Dr. Lushington, those eccentricities of her famous husband which rendered, in his opinion and hers, it impossible for her to live with Lord Byron. Forty years later when Lord and Lady Byron had both long been dead, Dr. Lushington lay on his own deathbed. In the interests of history and literature he was

pressed to reveal the secret he alone knew; but he resisted the pressure and did so avowedly on the ground that he would be setting a bad example to his profession if he were to disclose a confidence which his client had not authorised him to reveal. The maintenance of this principle is so important that, even although an important problem of literary biography has remained unsolved as the result of Dr. Lushington's chivalrous loyalty to his professional duty, no lawyer who cherishes the best traditions of his profession can regret his constancy.

The other suggested ground of "professional" misconduct, namely, the breach of a duty to the Court or the Prison Commissioners involved in an improper use of the access to the prisoner afforded to his legal adviser—is one upon which there is no clear authority, and on which, therefore, it is not easy to comment. It has been decided that a solicitor must act in the interests of his client, and must not use legal processes to assist private ends of his own: *Harbin* v. *Masterman* (1896, 1 Ch. 351). But now-a-days a solicitor who has defended a convicted prisoner is often under a duty to his client to use the influence of the press in order to draw public attention to his case and to secure the exercise of the prerogative of mercy. Where exactly that duty ends, and the communication of information to the press becomes an officious and improper act, is extremely hard to say; nor have any of the judgments delivered in Newton's case given much assistance in answering the question. If the case should go to the Court of Appeal, we hope that the tribunal will endeavour to lay down some clear rule upon this point for the guidance of the profession.

THE LAWYER IN POLITICS.*

The lawyer is, by every definition, an expert in the law, and society lives by law. Without it its life is vague, inchoate, disordered, vexed with a hopeless instability. At every turn of its experience society tries to express its life, therefore, in law—to make the rules of its action universal and imperative. This is the whole process of politics. Politics

* On June 12, Governor Woodrow Wilson delivered the following address before the Kentucky Bar Association at Lexington, Ky.

is the struggle for law, for an institutional expression of the changing life of society.

Of course, this is the deeper view of politics. It is not the view of the mere party man or of the professional politician. He thinks chiefly, no doubt, of the offices and their emoluments, of the tenure of power, of the choice of policy from day to day in the administration of the various departments of government; of the hundred advantages, both personal and partisan, which can be obtained in a successful contest for the control of the instruments of politics; but even he cannot escape the deeper view at last. He must express the policy of his party or the advantage gained by his occupation of office in statutes, in rules of law, imposed in the interest of some class or group, if not in the interest of society at large. He is really in the last analysis struggling to control law and the development and use of institutions. He needs as much as the statesman does the assistance of the legal expert, the skill of the technical guide; the lawyer must be at his elbow to see that he plays the game according to the nominal rules.

The lawyer, therefore, has always been indispensable, whether he merely guided the leaders or was himself the leader, and nowhere has the lawyer played a more important part in politics than in England and America, where the rules of law have always been the chief instruments of contest and regulation, of liberty and efficient organization, and the chief means of lifting society from one stage to the next of its slow development.

The lawyer's ideal part in this unending struggle is easy to conceive. There is long experience stored up in the history of law. He, above all other men, should have a quick perception of what is feasible, of the new things that will fit into the old, of the experiences which should be heeded, the wrongs that should be remedied, and the rights that should be more completely realised.

He knows what forces gather and work their will in the field of industry, of commerce, of all enterprise. He, if any man, knows where justice breaks down, where law needs amplification or amendment or radical change, what the alterations are that must be effected before the right will come into action easily and certainly and with genuine energy. He should at every turn be the mediator between society and the individual, between groups of men, between

all contending and contesting interests. He should shew how differences are to be moderated and antagonisms adjusted and society given peace and ease of movement.

It is a hard thing to exact of him, no doubt, that he should have a non-professional attitude toward law, that he should be more constantly conscious of his duties as a citizen than of his interests as a practitioner, but nothing less than that will fit him to play the really great role intended for his profession in the great plot of affairs. He must breed himself in the true philosophy of his calling. It is his duty to see from the point of view of all sorts and conditions of men, of the men whom he is not directly serving as well as of those whom he is directly serving.

This is a matter of character, of disposition and of training outside the schools of law, in the broader schools of duty and of citizenship and of patriotism. It is a great conception when once a lawyer has filled himself with it It lifts him oftentimes to a very high place of vision and of inspiration. It makes of him the custodian of the honour and integrity of a great social order, an instrument of humanity, because an instrument of justice and fair dealing and of all those right adjustments of life that make the world fit to live in.

If I contrast with this ideal conception of the function of the lawyer in society what I may be excused for calling his actual role in the struggle for law and progress and the renovation of affairs, I hope that I will not be interpreted as suggesting a view of our great profession which is in any wise touched with cynicism or even with the spirit of harsh criticism. The facts do not justify a cynical view of the profession or even a fear that it may be permanently losing the spirit which has ruled the action of the greater members of the Bar and of the immortal Judges, who have presided at the birth and given strength and fibre to the growth and liberty of human right. I wish to submit what I have to say in all fairness and without colour even of discouragement.

The truth is that the technical training of the modern American lawyer, his professional prepossessions and his business involvements, impose limitations upon him and subject him to temptations which seriously stand in the way of his rendering the ideal service to society which is demanded by the true standards and canons of his profession.

Modern business, in particular, with its huge and complicated processes, has tended to subordinate him, to make of him a servant, an instrument instead of a free adviser and a master of justice.

Moreover, the prepossessions of the modern lawyer are all in favour of his close identification with his clients. The lawyer deems himself in conscience bound to be contentious, to manœuvre for every advantage, to contribute to his clients' benefit his skill in a difficult and hazardous game. He seldom thinks of himself as the advocate of society. His very professional loyalty begets in him the feeling that he is the advocate now of this, now of that, and again of another special individual interest.

It is evident what must happen in such circumstances. The Bench must be filled from the Bar, and it is growing increasingly difficult to supply the Bench with disinterested, unspoiled lawyers, capable of being the free instruments of society, the friends and guides of statesmen, the interpreters of the common life of the people, the mediators of the great process by which justice is led from one enlightenment and liberalization to another.

For the notable, I had almost said fundamental, circumstance of our political life is that our Courts are, under our constitutional system, the means of our political development. Every change in our law, every modification of political practice, must sooner or later pass under their scrutiny. We can go only as fast as the legal habit of mind of our lawyers will permit. Our politics are bound up in the mental character and attitude and in the intellectual vigour and vision of our lawyers. Ours is so intensely and characteristically a legal polity that our politics depend upon our lawyers. They are the ultimate instruments of our life.

There are two present and immediate tests of the serviceability of the legal profession to the nation, which I think will at once be recognised as tests which it is fair to apply. In the first place, there is the critical matter of the reform of legal procedure—the almost invariable theme, if I am not mistaken, of all speakers upon this question from the President of the United States down.

The second and more fundamental immediate test of the profession is its attitude toward the regulation of modern business, particularly of the powers and action of modern corporations. It is absolutely necessary that society should

command its instruments and not be dominated by them. The lawyer, not the layman, has the best access to the means by which the reforms of our economic life can be best and most fairly accomplished. Never before in our history did those who guide affairs more seriously need the assistance of those who can really claim an expert familiarity with the legal processes by which reforms may be effectually accomplished. It is in this matter more than in any other that our profession may now be said to be on trial. It will gain or lose the confidence of the country as it proves equal to the test or unequal.

As one looks about him at the infinite complexities of the modern problems of life, at the great tasks to be accomplished by law, at the issues of life and happiness and prosperity involved, one cannot but realise how much depends upon the part the lawyer has to play in the future politics of the country. If he will not assume the role of patriot, and of statesman; if he will not lend all his learning to the service of the common life of the country; if he will not open his sympathies to common man and enlist his enthusiasm in those policies which will bring regeneration to the business of the country, less expert hands than his must attempt the difficult and perilous business. It will be clumsily done. It will be done at the risk of reaction against law itself. It will be done perhaps with brutal disregard of the niceties of justice, with clumsiness instead of with skill.

The tendencies of the profession, therefore, its sympathies, its inclinations, its prepossessions, its training, its point of view, its motives, are part of the stuff and substance of the destiny of the country.

THE COMMERCIAL LAWYER.

Angry creditor:—"Mr. Webster, the bank protested the check you gave me!"

Daniel, the Great:—(rubbing his forehead absently)—"Well, sir, you see, I've been checking and checking all day, and I guess there wasn't any more left."

In other words, the ablest practitioner America has produced lacked the first requisite to success as a "commercial lawyer."

Such a lawyer is, in fact, a new type, developed in the course of the last twenty-five years, under stress of modern conditions—and he has come to stay. His prosperity is so evident that attorneys who have paid little attention to this branch of legal practice are beginning to "sit up and take notice." Perhaps some are a little envious—more, probably, are wondering whether it wouldn't be advisable to extend their own business in that direction.

It is feasible to combine this feature with the incidents of a "general practice? Is it possible to be a "commercial lawyer, and not cease to be any other kind of a lawyer? Is the time coming when every attorney must study the means and methods of this branch of his profession, or go out of business?

These, and many similar questions, the average general practitioner would like to ask of the delegates who attended the convention of the Commercial Law League of America, held at Atlantic City, July 18th to 23rd. The league has 2,500 members in all parts of the country, and upwards of 600 attended, for the primary purpose of meeting personally men with whom they have had business dealings by correspondence.

The absence of the personal equation is the chief difficulty inherent in this class of business. For generations the American attorney, like his English cousin, from the days of the year books, has relied for his success upon his personal standing in his own community. His reputation among his neighbours, based upon his ability, his probity, his "magnetism," his learning, his ready wit, even his foibles of mind and temper—all these have formed part and parcel of his stock in trade. The practice he has thereby acquired is wholly personal. It cannot be bought or sold. It dies with him, and yet, because of this very quality of being a personal appendage, it is all the more precious in his esteem.

Suddenly the man who has, by years of industry, built up this sort of a practice, who is conscious that his reputation has extended beyond the limits of his own city, perhaps beyond the confines of his own State, wakes up to discover that important business, lucrative business, from out of town is being monopolized by some young fellow who perhaps studied law in his office, or by some comparative stranger in the community who, while able and honest, is more or less of a "plodder"—who isn't in the least degree

a "mixer," who has no taste for politics, no quickness of wit, eloquence, "presence," or even aptness at *repartee*.

At the outset the general practitioner was prone to say with a shrug of the shoulders, "Oh, he isn't a lawyer—he's a collector,"—but the young man thus summarily dismissed manages to get hold of important lawsuits and prosecute them successfully; he is always trustee or attorney for the trustee in bankruptcy proceedings, and clients who have done business with the older attorney for years begin to wander into the office of his younger competitor, at first, of course, with claims that must be sent out of the city for collection.

The younger man's business is country-wide. He can reach the rascally executor in the South, the dishonest factor in the West, the unprincipled correspondent in the East, and take care of the litigated estate in Texas and the will contest in Oregon.

Well, what is the older attorney to do about it? How is the younger competitor to bring about these results? The answer, "There are always the attorneys' lists," is hardly satisfactory. Every attorney has been asked to go into one or more of them. In a general way he knows that some of them are a good thing—and that others are the worst kind of "fakes." It is usually the latter that present themselves most persistently. Good things seldom knock at the office door, hat in hand, and obsequiously ask to be appropriated—and yet that is just what the average lawyer waits for.

These attorneys' lists, of which there are over 200, deserve careful study and the individual attention and discretion of the attorney who has made up his mind to be included in some of them. They group themselves under three general classes, though there are all sorts of "cross breeds." First, there are the lists that are more generally circulated among merchants and forwarding agencies; second, there are the lists which are merely a combination of attorneys in different places who agree to interchange their forwarding business; and, third, there are lists of lawyers whose business is not strictly commercial. An examination of these latter will generally shew, however, that the commercial lawyer who has studied the art of acquiring out-of-town business has usually managed to get a prominent place in the best general lists.

The expense of being included in one of these lists varies from nothing to $200, the cost being regulated quite as much

by the size and location of the subscribers' city as by the importance of the list itself. An attorney may easily spend a large sum of money in this sort of advertising without substantial return if he plunges recklessly into the vortex of schemes that await him on the threshold of his career as a commercial lawyer.

An attorney in a small or remote community can usually get his name into a number of important lists at small expense and such lawyers might profitably pay closer attention to the development of this side of their practice. Many have learned by experience, however, that a commercial practice cannot be increased as an incident to general business without time, patience, and close attention. It has even happened that good general practitioners have got into trouble through neg'igent handling of forwarded claims.

Most of the standard lists bond or guarantee their attorneys, and have well-organized grievance departments whose activities are called into play quite as frequently from carelessness as through misfeasance. On the other hand, of course, it is the gravity of the charge, rather than the amount involved, that requires the most strenuous interest of the grievance department.

An anecdote of this incident of commercial practice may be in point. A young attorney in a small western town failed to remit a collection of $200. The agent of the list in question made a long journey and called upon the young man, talked with him for several hours, and got his confidence. The lawyer frankly acknowledged that he had received the money some weeks previously. "Interest rates are high out here," he explained, glibly. "Jones & Brown, with whom I studied law, and one of our largest and best firms, always hold back their collections a month or so and get the interest—see!"

"You'll borrow that $200 and pay us to-morrow morning," said the list agent.

"Who'll lend it to me?"

"Jones & Brown."

"They aren't in that business. You don't know them."

"They will this time. Just tell them about what you've told me, and they'll go your note."

Jones & Brown indorsed the young man's note the following morning as predicted. It made little difference whether he'd lied about their methods of doing business or

told the truth. The young man who had studied law with them wasn't adapted to a commercial practice.

While it is a simple matter to get into a list of some sort. a place in one of the more important standard books is a commercial asset, especially in a city of any size. Vacancies are watched with eager eyes, and competition is keen. The business, judgment and acumen required throughout the career of the commercial lawyer is nowhere more essential than at the very threshold. How to get business isn't taught in the law schools, nor in any other curriculum than the school of life. Of course, a list which is widely circulated among clients, trade agencies, and wholesalers from whom the business is forwarded direct, may prove a very remunerative investment.

The collection fees are standardized:—10 per cent. on $300, 7½ on a thousand, and so grading down to 5 and 2 per cent. on larger sums. Of this one-third goes to the forwarder and two-thirds to the receiving attorney.

The commercial attorney who has solved the various problems that are incident to this branch of the profession, and has established a large correspondence business, is possessed of a practice which differs from that of all others in its permanency. He can lose it, to be sure, by persistent neglect, but given any ordinary degree of ability and industry, and he has a good will which is transferable to his son, his partner, or which may even be sold for a substantial sum to a new comer. English physicians buy and sell a practice, but in this country almost the only professional good will which has this saleable quality is that of the commercial lawyer.

And yet, in the last analysis, it is always "the man behind the gun" in commercial law, as in every other walk in life. The necessity of knowing the man to whom you are intrusting important interests a thousand miles away has given birth to the commercial law league, whose recent convention has served to attract the attention of the bar generally to this line of work.

In the course of his discussion of the ethics of the commercial lawyer, Mr. Oppenheimer said:—

"Then if the so-called commercial lawyer is a necessary product of the times, there is no reason for supposing that his mode of practice is necessarily less ethical than that of any other member of the profession. Indeed, if we are correct in saying that business itself is being rapidly made more ethical

—if the world, despite its progressive commercialization, is really growing better, and if civilization is spreading, then those lawyers whose services are largely devoted to the adjustment and maintenance of the proper commercial relationships must inevitably get in line with the *Zeitgeist*—with what Maeterlinck has expressly called 'The Spirit of the Hive.' The mere fact that the commercial practitioner may ofttimes represent clients at a distance, or be called upon to interpret the bankruptcy law, or assist unfortunate debtors in effecting an extension of credit, does not mean that he must be less ethical, less honourable, or less trustworthy than his brother who receives large annual retainers for enabling corporations to dodge the tax inquisitor."

These are but "tit-bits"—a detailed report of the convention would be impracticable, and aside from the purpose.

The committee on lists and agencies made an important report. Of 218 such lists and agencies it has sifted out some sixty odd, which deserve serious consideration from commercial lawyers.

As Mr. Oppenheimer pointed out, commercial law differs from other practice in the fact that advertising is ethical, because it is essential. The man who wishes to get business from localities where he cannot be known personally must adopt the methods of the merchant. Once granting that he may—must advertise, the only question is where he shall stop, and that must be regulated solely by expediency. This innovation is a necessary concomitant of the growth of business to country-wide and even world-wide proportions.

It is useless to inquire: "Is the law still a profession?" or bewail the "degeneracy of the times." The latter have changed and law business must change with them. To what extent he shall conform to such changes must always depend upon the judgment, tastes, and abilities of the individual attorney. It is for him to decide whether it is worth while to endeavour acquiring out of town business.

Of course, it is a good thing to get business. Of course, "business brings business;" and small business must be carefully attended to if one wants big business. All this is just as true of commercial practice as of any other.

In a general way it may be said that "commercial lawyers" in the larger cities are inclined to specialize, though they are often retained in important general litigations

through their correspondents. Their offices must necessarily be organized to take care of much small business, and their time is often monopolized by petty details, perhaps narrowing their view and disqualifying them for other kinds of work.

The average young lawyer, fresh from his academic studies, seldom knows much about the most ordinary incidents of trade and commerce. He has doubtless borrowed money, and therefore has some personal experience with "promissory notes." He may even have been notified of an overdraft by his banker, but that is the only kind of a draft he has dealt with.

Nor will his activities, in the ordinary run of general practice, serve much to enlighten him on questions that arise in interstate commerce. He has doubtless taken a course in "carriers," and has puzzled his brain over the intricacies of "stoppage *in transitu*," but it may be years before any instance arises where this learning will be called into play.

Of course, when the time does come, he will have his "L. R. A." at his elbow, and can refresh his recollection from a complete note on the subject. But will his client consult him or go to the "commercial lawyer?"

All this is but a part of the ever recurring question: "How far is a general practice possible under modern conditions? The great majority of attorneys are still general practitioners, turning from wills to patents, from the client whose son is in trouble with the police to one who has a line fence dispute with his neighbour; from the one who has inflicted injuries through the careless handling of his automobile to the client who wants to form a corporation, and from all these to the man with a claim for $10 to col'ect.

But the general practitioner may discover that a trust company has been consulted about the will and a patent attorney about the patent, that a criminal lawyer is looking after his client's son, and a real estate attorney settling the line fence dispute, that the insurance company's attorney is defending the automobilist, a bank attorney forming the corporation, and that the man with the $10 claim to collect has put it into the hands of the commercial lawyer.

And yet the fact remains that the general practitioner still manages to exist and to do business at the old stand—for, when all is said and done, and due allowance made for important and increasing exceptions, the great majority of

clients still come to a man from his own vicinity because he is what he is, a tower of strength to the men about him unlearned in the law, who know him, and like him, and trust him in their most important concerns and most intimate and confidential affairs.

CURRENT COMMENT.

IMAGINARY IMPROVEMENT OF MEMORY.—In *Hamilton* v. *Hamilton,* 15 N. Y. App. Div. 47, 44 N. Y. Supp. 97, Mr. Justice (now Chief Judge) Cullen said: "One can cultivate by training the faculty of memory to a very great extent, and doubtless the plaintiff had done so," etc. The late Mr. Justice Van Brunt evidently entertained the same opinion, for in *Matter of Cross,* 85 Hun. (N. Y.) 343, he said (italics ours): "We think that we may take judicial notice of the fact that persons who are engaged in business, who cannot read and write, have their *faculty of memory more acutely educated,*" etc. But here is a quotation from James's "Principles of Psychology," vol. 1, pp. 663-664, under the caption, "One's Native Retentiveness is Unchangeable" (typography the author's):—

"It will now appear clear that all improvement of the memory lies in the line of elaborating the associates of each of the several things to be remembered. No amount of culture would seem capable of modifying a man's general retentiveness. This is a physiological quality, given once for all with his organization, and which he can never hope to change. It differs no doubt in disease and health; and it is a fact of observation that it is better in fresh and vigorous hours than when we are fagged or ill. We may say, then, that a man's native tenacity will fluctuate somewhat with his hygiene, and that whatever is good for his tone of health will also be good for his memory. We may even say that whatever amount of intellectual exercise is bracing to the general tone and nutrition of the brain will also be profitable to the general retentiveness. But more than this we cannot say; and this, it is obvious, is far less than most people believe."

The distinguished psychologist then proceeds to explain with characteristic force and lucidity the error of many people

in supposing that the native tenacity of memory can be improved by discipline.

REVISED EDITIONS.—A suggestion offered by Mr. Carlo P. Sawyer, librarian of the Chicago Bar Association, in favour of the substitution of a system of supplemental volumes for periodical new editions of law treatises, meets with the approval of the *National Corporation Reporter,* which says:—

"If the author of a one or two-volume text book would get out a supplemental volume at the end of, say, ten years, the text and citations being distributed, by numbered paragraphs, according to the scheme of the original work, and at the end of another ten years would get out a second supplemental volume, embracing both the material in the first volume and subsequent decisions, there would be no reason for revising the book more than once in a generation and the cost of the supplemental volume would be trifling compared to the cost of a second edition."

The law publishers and text writers, no doubt, have their own side of the question, and while the mercenary advantage of disposing of a new revised edition may count for something with them, the existing practice exists primarily as a matter of custom, no new method of keeping text-books up-to-date having yet been devised, and also undoubtedly, as the result of a conviction that the needs of the practitioner are best served by placing at his disposal a complete volume rendering reference to earlier editions unnecessary.

In revising a law book to keep it abreast of the times, it is frequently necessary not simply to add new citations and make minor alterations, but to rewrite large portions of the text, or even to recast much of the original material. In such cases a supplemental volume would obviously be a disadvantage rather than an advantage The object, of course, should be to provide a labour-saver, and a supplemental volume which would require diligent comparison with the original one to be fully understood could not attain any real utility.

On the other hand, there are undoubtedly many examples of new editions issued merely to include latest citations and record minor changes in the law, entailing few radical changes

in the original text. In such cases the supplemental volume would be a boon to many practitioners not caring to spend too much for new law books, but it is evident that it would not be a time-saver, as it would be necessary to consult both the supplemental volume and the original edition.

Moreover, there is always a definite market demand for the late revision of a standard work, and there is the important element to be considered of those who would prefer, in stocking their libraries to buy new editions, rather than old. A publisher cannot afford to run the risk of being outclassed by competitors, and an author will naturally take a selfish interest in keeping his book before the public in the most up-to-date form possible.

The solution seems to be that it is hopeless to think of driving the new revised editions from the market and substituting for them thin volumes of annotations. Within narrow limits, however, there may be a field for the annotation system; it might be tried in the case of a few books which after five years need to be brought up-to-date, yet do not call for revision throughout. It might thus supplement the system now in vogue without seeking entirely to supplant it.

THE LORD CHANCELLORSHIP.—Lord Langdale, who was offered the Great Seal by Lord John Russell on the resignation of Lord Cottenham in 1850, recorded the attractions the office had for him, as well as the reasons which, on a balance of advantage, led him to refuse it. "Persuasion that no one can perform all the duties that are annexed to the office of Chancellor. Certainly that I cannot"—such was one of his reasons, which was in keeping with his oft-expressed view that the political and judicial functions of the office ought to be severed. Lord Loreburn, who has now occupied the Woolsack for nearly six years, would appear to be arriving at a similar conclusion as to the arduous nature of its multitudinous duties.

"Speaking for myself" (said the Lord Chancellor recently in the House of Lords) "I shall go on as long as I can doing my best, but the time is coming and near at hand when the combination of the duties of Speaker of one of the Houses of Parliament, of a Judge of the Court of Appeal, of a member of the Cabinet, which has important and moment-

ous matters to decide, to say nothing of the administrative duties of lunacy, magistrates, and other matters, may be too much for the strength of anybody, unless it is mitigated by the lightening of the burden in some direction."

Lord Loreburn did not, unfortunately, indicate the direction in which the burden should be lightened. That the position of the Lord Chancellor, at once a Judge and a Cabinet Minister, is anomalous is not to be denied. Lord Brougham declared that the union, in the person of the Lord Chancellor, of legislative with judicial functions was wholly to be reprobated, and Walter Bagehot, in his "English Constitution," describes the office roundly as "a heap of anomalies." The union of legislative and judicial functions is not, however, peculiar to the Lord Chancellor. It is personified by every Law Lord. To destroy the dual character of the Lord Chancellor would be to destroy utterly the historic office. It might survive in name, but would disappear in reality. The practical question is whether the occupant of the Woolsack could not advantageously be relieved of some of his routine work, and the most promising solution of the problem is to be found in the proposal for the appointment of a Minister of Justice, whose services would lessen the legislative and administrative responsibilities of the Lord Chancellor, while still leaving him with an adequate amount of work as head of the judiciary, a member of the Cabinet, and Speaker of the House of Lords.

COURTHOUSES AND INSCRIPTIONS.—"It is becoming more and more the practice in Germany of late to adorn the Courts of Justice with sententious inscriptions, and so to brighten the gloomy realm of Themis with the light of poesy." This is how the "light of poesy" shines upon a Court in Berlin:—

> No prisoner and no good salad spoil;
> Let each have less of vinegar than of oil.

The scriptural inscription over the main entrance to the Central Criminal Court, "Defend the children of the poor, and punish the wrong-doer," was the subject of a good deal of criticism, but it is rather fortunate, after all that the "light of poesy" was not allowed to illumine the portals of

the Court. And here is one of many couplets which are said to adorn a new court building in Rudolstadt:—

> At losing shew no tearful face,
> Two cannot win the self-same case.

Is there ever a disappointed suitor at the Courts of Justice who would be comforted by this "glimpse into the obvious?"

THE ART OF CROSS-EXAMINATION.—Some twenty years ago, as the result of Sir Charles Russell's handling of one of the witnesses in the famous Osborne case, an outcry was raised in the press against what was called "the abuse of cross-examination." To-day, in consequence of a Divorce Court scene in an emotional play, of which Mr. Hemmerde, K.C., is one of the authors, we have, from persons in whom sentiment takes the place of judgment, a mild revival of the protest. The tortures which the heroine of "A Butterfly on the Wheel" endures in the witness-box in the Divorce Court are entirely due to her own indiscretions. The audience knows that she is innocent, but her husband's counsel, who submits her to a searching cross-examination, has every reason to believe that she is guilty, and is seeking to conceal the truth. If the evidence given against her is not sufficient to point to infidelity, there is scarcely a petition in the Divorce Court that could succeed. The very penalty of indiscretions in matrimonial affairs is that they are clothed with the appearance of guilt. Cross-examination is merely an instrument for ascertaining the truth—an exceedingly unpleasant instrument, it is true, to an indiscreet lady who is conscious of her innocence—and her husband's advocate does not, apart from some unnecessary intimations of his disbelief in her story, employ it in a manner unworthy of an English gentleman. The notion that cross-examination is a wheel on which innocent persons are broken is utterly absurd. "You seem to think the art of cross-examining is to examine crossly," Baron Alderson once remarked to an advocate who was cross-examining with more vigour than skill. All the foremost exponents of the cross-examiner's art have recognized that courtesy is more effective than bullying. Of the famous Scarlett is has been written that "he would take those he had to examine, as it were, by the hand, make them

his friends, enter into familiar conversation with them, encourage them to tell him what would best answer his purpose and thus secured a victory without appearing to commence a conflict." There is, in truth, an excellent reason why, apart from his regard for his calling, an English advocate should never attempt to browbeat a witness. Every jury-box contains twelve possible witnesses in other causes, and they are quick, in these days at any rate, to resent any unfair use of the cross-examiner's power. The cross-examiner has, of course, to adapt his methods to the character of the occupant of the witness-box; an assertive witness cannot be approached in quite the same style as a timid one; but the idea, which some persons have derived from "A Butterfly on the Wheel," that cross-examination is systematically cruel and ill-directed, can be entertained only by persons who have no real acquaintance with the administration of the law.

ENGLISH AND FRENCH PRISONS — A writer in the *Gaulois* propounds the question, where is it that one would desire to dwell? And he scornfully answers, where, but in prison indeed! In the French prisons we are told the inmates not only eat well, but they are enabled to drink while they eat. The writer then makes extracts from recent returns of the jail commissariat. He passes over without comment the 975,000 kilos of flour (a kilogram being two and one-fifth pounds), 14,000 kilos of various kinds of meats, 225 kilos of potatoes, 60,000 kilos of haricot beans, but then he proceeds: "What think you of 84,000 tablets of chocolate, 16,000 red herrings, 100,000 sardines, 17,000 kilos of butter, 3,000 kilos of coffee, 85,000 new-laid eggs, 50,000 kilos of bologna sausages, 2,000 cheeses of various kinds, 200 kilos of caramels, and 2,000 kilos of other sweetmeats?" The writer thinks that a prisoner when his time expires will naturally want to stay on if it were only for the caramels and other sweetmeats. "Yes," he says, "we do all we can to make the prisoner's sojourn agreeable and to attract him back. In England, on the other hand, *le chat a neuf queues* and the hard labour have a salutary terror. The (English) jailers do not often see their clients return. But with a *bonhomme* who passes his time in the shade, gorged with tablets of chocolate, with sardines, cheeses of various kinds,

things are different. If perchance he has a desire to return for good, he will exert himself very little to provide for himself. The taste for new-laid eggs and bologna sausage will be too strong for him, and he will steal a loaf, knowing well that he will be enabled to eat it with butter."

SCIENTIFIC STUDY OF THE CRIMINAL.—Mr. Arthur Macdonald of Washington, D.C., is the author of a recently published pamphlet in which a plea is made for a more scientific study of the criminal classes. "The study of criminology," he says, "like the study of medicine, should be carried on by scientific methods—that is to say, all the conditions, occasions and causes of crime must be investigated first, if the treatment is to be a rational one." By the "scientific method" the author means that method in which "all facts form the basis of investigation." The object of such a study is ultimately to benefit the State by lessening the amount of crime, which in itself is sufficient justification for the humane use of criminals for this purpose. The writer points out that investigations may be carried on with imprisoned criminals with practical advantages that do not obtain elsewhere. With them conditions such as diet, manner of living, etc., are substantially uniform, while questions could be asked and would probably be answered with greater freedom than any place else. Moreover, the facts derived from such a study could well be applied to knowledge of man in general, since the great majority of criminals do not differ, physically or mentally, from the normal man. Laboratories for such investigations have already been established in many universities; but there is a great need for other laboratories whose ends are "not pedagogical, but sociological and practical, and of more utility to society directly." Their purpose should be to "collect sociological, pathological, and abnormal data as found especially in children and in the criminal, pauper and defective classes, and in hospitals; to gather more special data with instruments of precision, and also to collect and publish the results of similar work in this country and Europe."

A complete study of a criminal, we are told, must include not only his history his ancestry and his previous environment, but also exhaustive studies of his psychophysi-

cal self, including, for instance, measurement of thought, time, sight, hearing, touch, taste, smell, pressure, heat, cold, etc., together with a postmortem examination of his physical organs.

Discussing the urgent need for more accurate information concerning the criminal, the author has the following to say:—

"At present our jurists study law books much more than they do criminals; and yet perhaps one-half of the time of our Courts is confined to criminals. Criminals are considered by many jurists, prison employees and the public as normal men, who are unlucky and unfortunate. The individual study of the criminal and crime is a necessity if we are to be protected from ex-convicts, the most costly and the most dangerous class we have. But the criminal cannot be studied without being seen and examined. For the love of science and humanity we permit the examination of the sick, of pregnant women by young men, manipulation in surgical clinics of fractured members; the visiting, examination and individual study of the insane, although these are sometimes injurious to the insane. But the criminal may not receive visits, may not submit to a scientific examination. Why should criminals be so privileged a class? An accused innocent person may have his name and life, with photograph, published in the newspapers; and yet objections are raised to the study of habitual criminals for scientific purposes."

LORD JAMES OF HEREFORD.—The legal profession has suffered in the death of Lord James of Hereford, the loss of one of its most honoured leaders. Some of his principal rivals at the Bar displayed more conspicuous gifts of advocacy. He lacked, for instance, the elemental vigour which caused Russell to be described as "a natural force let loose." But in quickness of perception, in lucidity and fluency of speech, and in persuasiveness and dignity of bearing, he was excelled by none of the famous men with whom he did battle in the Courts. The keynote of his character, both in the Courts and Parliament, was sincerity, not the enthusiasm which is sometimes mistaken for strength of purpose, but the high-mindedness that rightly expresses itself in mod-

eration. His refusal of the Great Seal, because he differed from Mr. Gladstone's Irish policy, merely made known to the general public that high sense of duty, that chivalrous devotion to what he deemed to be right, which his professional brethren had long learned to admire. All the same, the renunciation of the great prize of the profession can have been no easy thing to a man who had so well earned it, and the sacrifice of his ambition to his principles must always remain a bright and inspiring incident in the annals of the English Bar. To remember the zeal and dignity with which he discharged his duties as Attorney-General is to realise how admirably he would have filled the office of Lord Chancellor if it had been his fortune to occupy it. He had, among more personal qualifications, the true spirit of the law reformer. For fifteen years he gratuitously rendered the country the most valuable service both on the Judicial Committee and the judicial work of the House of Lords, and his more important decisions, if not to be ranked among the most famous judgments delivered by members of these two tribunals, were admirable specimens of lucid statement and judicial reasoning. Some twenty years ago, speaking at a meeting of the Barristers' Benevolent Association—an institution in which Lord James of Hereford took a constant and generous interest—the late Lord Esher described him, in characteristic terms, as "the pearl of our trade." It is a tribute which he continued to deserve until the end.

Lord James of Hereford's refusal of the Great Seal was not an unique event. The late Lord Selborne once refused the Lord Chancellorship for similar reasons, though, unlike Lord James, he was fortunate enough to have another opportunity of accepting it. Mr. Gladstone pressed him to accept the coveted office in 1868, but Lord Selborne was opposed to the disestablishment of the Irish Church, and declined to join a Government that was pledged to it. Four years later, however, after the Irish Church had been disestablished, the offer was renewed, and Lord Selborne was at liberty to accept it. It is somewhat curious that the only two lawyers who have been known to refuse the Woolsack for political reasons should have received the offer from Mr. Gladstone, and that in each case it was disagreement with his Irish policy that led to the refusal. Two other instances of the Great Seal being declined are recorded, but in both personal, not political, reasons were the determining

factor. Lord Langdale refused the Lord Chancellorship on the resignation of Lord Cottenham in 1850, and Lord Kingsdown, better known in the Equity Courts as Pemberton Leigh, resisted the temptation to accept Lord Derby's offer of it in 1858. The reasons which led Lord Langdale to renounce the great prize of the profession have been preserved in a private note he penned at the time of his decision. On the "contra" side he wrote:—

Persuasion that no one can perform all the duties that are annexed to the office of Chancellor. Certainly that I cannot. Unwilling to seem to undertake duties, some of which must (as I think) be necessarily neglected. No reason to think that the extensive reform which I think necessary will meet with any support. No particular party zeal, and no capacity to acquire any. Declining health.

On the "pro" side Lord Langdale—who had always been a strong advocate of the severance of the Lord Chancellor's judicial and legislative functions—wrote:—

Salary 14,000*l.* instead of 7,000*l.* Pension of 5,000*l.* assured (instead of 3,750*l.* not assured). Patronage for benefit of connexions much needing it. Some, though small and doubtful, hope of effecting some further reform in Chancery.

Legal records can furnish few more interesting pictures than this of a Master of the Rolls sitting down to record calmly and minutely the reasons for and against accepting the Lord Chancellorship, and realising that the "contra" side of the account is weighter than the other!

THE LIGHT SIDE OF THE LAW.

FAME—AND A MANGLE.

He occupied more than his share of a third-class carriage. He was stout, tobaccoey, loquacious, and earnestly desired controversy. He at first addressed his observations to a meek-looking little man in a billycock hat, who sat opposite, and who replied, in a non-committal manner, "I suppose so," "I dare say," and so on, finally taking refuge behind a copy of an evening paper.

He then glanced round the carriage in search of a fresh victim. A stout woman, after replenishing herself mysteri-

ously from a shabby reticule, had subsided into slumber. A bristly person in a big ulster had entrenched himself behind his newspaper, so he turned to me, and I at once saw by the change in his countenance that he knew he had found what he wanted. That is the worst of having a good-natured face. I have heard men of conspicuous rectitude, but cursed with red noses, complain bitterly of the misconstruction habitually placed by strangers upon their character and conduct. I have heard ladies say that the custody of a small child is made an easy and plausible excuse for friendly advances from persons whose acquaintance could not possibly be desired. In a similar spirit I may complain that a countenance which is not obviously hostile to those in its vicinity brings upon its possessor a steady stream of requests, confidences, and communications. But this is a digression.

"The worst of this Government, sir, in my opinion, is that they're mostly lawyers, which means that they're always talking, and arguing, and considering, and get very little done. Not that I ought to speak unkindly of lawyers—I'm Pringle, I am."

"Oh," said I, "I do not think I have heard of you before."

"Perhaps not, sir," said he, "you not being a lawyer, as I can see from your face—you'll excuse me, sir. I am Pringle, sir—Pringle—People's Home Comforts, Limited, *versus* Pringle and others. I'm a Leading Case."

"I do not understand," said I.

"It's a long story," said he; "but as you want to know I'll tell you."

I protest I had not exhibited any sign capable of such misinterpretation.

"It was over a mangle that was seized by a sheriff."

I thought I saw my opportunity to snub him.

"A distress for rent," I said unsympathetically.

"No, sir; you're wrong. Not a distress—an execution, by the sheriff. I'll tell you, as I've promised. Why there was an execution doesn't matter. It was put in by a firm in Southampton Row, of whom I had bought a piano, payable by instalments."

"I wonder they didn't seize the piano," said I.

"They couldn't," he replied; "times were bad, and I'd had to sell it to pay for my daughter's music lessons. So

they took the mangle, and, in spite of all the notices they got, they sold it. The reason why I became a Leading Case was owing to the circumstances connected with that mangle. It had been borrowed by my wife of an aunt of hers. The aunt was paying for it by instalments, but, of course, that was no reason why she should not lend it to us. A friend of mine—a greengrocer—took his cart one evening, and brought it round, my wife's aunt being about to close her house for a time. When it came, what with it being a light mangle and the girl heavy-handed and pinching her fingers owing to it shifting about, we fastened it to the floor with some clamps. What made things worse was that my rent, as well as aunt's, was behind at the time, and, owing to a mistake, the mangle was included by me in a bill of sale, which it had been convenient to have for a time, but which isn't now of any concern to you or anyone else."

"It was a mangle with a history," said I.

"You're right," he replied; "you would hardly believe how many people put in a claim! It came on in the County Court, and took three days. There were sixteen witnesses, including the wife and myself, also the aunt, who was as nasty and distant as could be, besides untruthful, as all the lawyers agreed. 'Tisn't for me to criticise barristers, I suppose, but the way some of the witnesses were treated was enough to get anyone's blood up. I'll say nothing of the insults to me, but the wife was tried and twisted and made to contradict herself till she had to have smelling-salts, and the Judge suggested she should be released and allowed to cry in the passage. Then they went through aunt's mind with a small-tooth comb—if you'll excuse the vulgar way of putting it, sir. After which, if you'll believe me, they went off into law books and other leading cases which no intelligent man could make head or tail of."

"Well, what—I mean, who won?" said I.

"It is difficult for me to explain," replied Mr. Pringle; "the County Court Judge seemed worried. He mentioned cases in favour of one side, and a lot more in favour of another, and seemed to think that whatever he decided would not please anybody. He took it for granted that there'd be an appeal, and finally gave his decision in favour of a barrister with whiskers and a loud voice who represented the people who supplied the mangle to my wife's aunt. Then

he said something about costs, which I didn't understand, but which seemed to please all the lawyers.

"You might think that was the end of the dispute, but, as a matter of fact, it was only the beginning. We had it all over again two months after in what they call a Divisional Court, where there were no witnesses and, to my mind, a good deal less sense talked. Three Judges there was: one a big man with a tired face and an impatient manner, who kept on interrupting; another was a man with twinkling eyes, who seemed amused at it being about a mangle, and kept making jokes at which everybody laughed. There was an usher that I thought would have to be carried out, his sense of humour was so strong. The third Judge was a very small one, who looked as if he had a headache. He hardly opened his mouth, and when he did the big one in the middle spoke to him pretty sharp, and gave him to understand that he hadn't grasped the point. A rare to-do they had, and it ended with a complete reversal of form, my landlord coming in first this time, with the bill of sale holder second, and the firm that supplied the mangle pretty well out of the running. A mortgagee of my house, that I hadn't ever heard of before, did very well and was placed"

"It seems to have been a very spirited litigation," said I.

"It was," replied Mr. Pringle, "and, owing to what the Judge with the twinkling eyes said, they decided on having another round in the Court of Appeal. This time I was a non-starter as, owing to circumstances I need not trouble you with, bankruptcy had supervened."

Mr. Pringle pronounced these last words with needless emphasis, so that the man in the ulster shifted his position and snorted. Mr. Pringle looked fiercely in his direction. The stout lady in the other corner woke up.

"My son's in a bank," said she; "he is a bank porter. He has to wear plum-coloured——"

The train roared into the Merstham tunnel, and by the time it emerged the lady, satisfied with this assertion of her social status, had relapsed into slumber.

"I said nothing about banks," continued Mr. Pringle. "I was telling you why I was out of it when they got to the Court of Appeal They did have a field-day of it there. There were extra counsel, and, from a glance I had at the briefs, each of them was getting a fee big enough to provide every washerwoman in Dalston with a mangle. You'll have

gathered, sir, it was the principles involved that made my case so important, and poor old Pringle was really a sort of legal football, being kicked about by the Landlords' Defence League, the Machinery Trades Association, and another body whose name I forget. The arguments were past me, and about the only thing in the Court of Appeal I understood was just before I had to leave the Court. It was when the bill of sale man was receiving his quietus.

"'Your client has his remedy against the man Pringle,' says one of the Judges.

"'Pringle, my lord, is a man of straw,' replies counsel.

"Then when I got up and pointed out that to say a thing like that will injure me in my business, the usher takes me by the shoulder. I won't trouble you with what I said to that usher outside. The result was, as I found from the papers, that my landlord's mortgagee held the trumps, mainly, as far as I could gather, owing to the clamps my wife had to put on to hold the mangle to the floor. And long after that I heard that a final battle took place somewhere in the House of Lords, where everybody was laid out except that mortgagee, who, to my mind, had less to do with the mangle than anybody else."

Mr. Pringle leaned back and beamed at me with an air of condescension.

"I am in all the law books," he said. "Whenever it is a question of fixtures, or bills of sale, or hire purchase, what the lawyers say is, 'Look up Pringle's case.' 'Your name will never be forgotten, Pringle,' said a solicitor's clerk to me, comforting me after the Court of Appeal; 'you are more sure to be handed down than if you had written a book or saved someone from drowning.'"

"It is gratifying to become famous," said I. "What became of the mangle?"

"Didn't I tell you?" said he. "Of course, we have got it still. My daughter bought it when the sheriff sold it at the start, and very cheap it went under the hammer."

CHARACTERS FOR SERVANTS.

Her father has called and removed her box in a wheelbarrow. She has cried over the baby and embraced the dog. The month's wages have been paid—and received with a sniff or a snort, as the final mood may dictate. The door has closed upon the last act of Mary, and the stage is prepared for the advent of Jane.

As the result of pointed inquiries addressed to a lady you have never seen and of whom you know nothing, you are assured that Jane is industrious, clean, cheerful, competent, honest, an abstainer, a member of the Church of England, and undistracted by anything in the nature of a "follower." You turn your back on previous experiences, and are persuaded that the embodiment of all human virtues has been procured for £22 per annum, with board and washing.

If there is anything still left unsaid on the perennial subject of the relations between domestic servants and their employers, it has not been reserved for this writer to say it. But this custom of giving and receiving characters bears aspects which appeal to the student of contemporary manners. For instance, domestic service has never been standardised. Different ideas prevail. In the Jones's house, where Mr. Jones is the person to be considered, the cooking is the all-important thing. At the Robinsons', where Mr. Robinson "never interferes with the wife," cleanliness is exalted above all else. It is easy to see that the servants of these two households, bearing the most excellent references, might prove failures if exchanged.

There is also to be reckoned with the amiable soul who believes in giving the girl another chance. The character written by this employer may reflect charity and forgiveness and a disposition to look on the bright side of things, but as a record of fact it is a delusion and a snare.

It is worth pointing out that the giving of a character at all is not compulsory. It has its origin not in any right on the part of the servant, but in an instinct of mutual protection among employers.

The law in its wisdom declares that "characters" given by employers are "privileged communications"—which

phrase, like many pronouncements of the law, provides pitfalls for the lay mind.

Not all that one lady can say to another lady about the cook comes under the phrase quoted. If the rumour be true that discussion of the domestic servant problem, supported by testimony from each lady present, whiles away many tedious hours in drawing-rooms, then it is important to remember that there is no legal protection in those circumstances to cover any unintentional deviation from the region of strict and sober fact. You are talking about your servant to people who are not concerned in the matter, except as one lady is naturally interested in the affairs of another. The ordinary law as to defamation applies. Strange as it may seem, it is only when the thing becomes in the nature of a duty that the law attaches the term "privilege" to it.

Suppose Mrs. Brown says to Mrs. Jones over a friendly cup of tea:

"I am sure Emily, my housemaid, is dishonest. I have missed several things, and should like to search her box, but John won't let me."

Mrs. Jones makes a sympathetic reply, and is probably unaware that she is the recipient of a slanderous communication. Should the conversation come round to Emily's ears, and she be a young woman of decisive character, woe betide Mrs. Brown! Unless she can prove the truth of her suspicions (an almost hopelessly difficult task) she may find herself defendant in a lawsuit with all to lose and nothing to gain. Moreover, by an odd freak of English law, the blameless Mr. Brown may be co-defendant and held pecuniarily answerable for the freedom of his wife's tongue.

So, too, if Mrs. Jones, by way of continuing the enthralling conversation, says, "I never have liked that housemaid of yours; she is too fond of talking to men when your back is turned," then she, also, has entered the region of gratuitous observation, and it may go hard with her if the accuracy of her strictures be challenged in a Court of law.

But suppose Mrs. Jones, contemplating the engagement of the aforesaid Emily, is making *bona fide* inquiries of Mrs. Brown on the points alluded to. Mrs. Brown replies: I am doubtful whether she is quite to be trusted, as we have missed things since she came. I also think she wastes time with the tradesmen." Here Mrs. Brown's suspicions may be wrong, but it is a privileged communication made under a

sense of duty to Mrs. Jones, and Emily cannot succeed in any action at law unless she can prove "malice."

It is difficult to define the legal meaning of the word "malice." Perhaps the best test is to consider whether the dominant motive of Mrs Brown is to give information useful to Mrs. Jones or to injure Emily. If the latter, then there is malice, and the character, if untrue, is no longer privileged. You perceive this involves an inquiry into the state of Mrs. Brown's mind, and the law is an unhandy implement for a metaphysical excursion of this kind.

The manner in which the character is expressed, however, goes far to settle the question of malice. "I regarded my late cook as untidy, unclean, and very wasteful." Poor cook may be none of those things, but such a letter is a businesslike expression of a genuine belief, and her failure to secure the new situation leaves her with no remedy against her late mistress. Suppose, however, Mrs. Brown, with a sense of recent injury and conscious of the possession of a lively literary style, pens something like this: "You will find her tidy—if a dirty face, a cap awry, and tapes and buttons never under control strike you merely as pleasing indications of temperament. You will find her clean—if you avoid the kitchen before meals and refrain from inspecting the insides of the saucepans. You will find her economical—if you regard the stealthy bestowal of provisions on relations as a meritorious, if vicarious, form of charity." Sardonic humour of that sort is calculated to land Mrs. Brown in serious trouble.

To sum up. If you are asked for a character, state what you honestly believe and express it in the plainest fashion. You need not fear the result. If, however, your feelings are at all likely to get the better of you, remember that you are under no obligation to give a character at all.

MY TRUSTEESHIP.

A LAYMAN'S EXPERIENCE.

Be pleased to hear something of what it means to be a trustee. I am one.

The thing dates back about fifteen years, and starts from a chance encounter with Tom Gregson by the Mansion House.

"By the by, old chap," said he, "my lawyer has been telling me I ought to make a will, so I've stuck your name in as executor."

Gregson and I were at school together. Later, we often travelled up to town by the same train, and our wives were bosom friends (things are different now), so I assented lightly enough, making some more or less felicitous observation about the chances of life and the unlikelihood of my being called upon to act. Next summer came the wreck of the Drummond Castle—poor Tom was returning in it from the Cape—and my trusteeship materialised.

Well, I "sold and converted into money"—of course, under the lawyer's advice—and I invested the proceeds in "some or one of the modes of investment authorised by law for trust funds." I duly paid over the diminished income to the highly dissatisfied widow, and with regard to the principal, "hereinafter called the residuary trust fund," I feel in the unenviable position of a man charged with the custody and preservation of a gallon of water in a leaky bucket.

For example, Gregson left £10,000 worth of bank shares, yielding him about 4½ per cent. The stockbrokers explained the nature of the uncalled liability on them, and we sold them. He left £10,000 worth of leasehold property, returning a comfortable 6 per cent. From the legal point of view, this was a "wasting security," so we sold that as well. With the proceeds of the two sales we purchased Consols at about 112 and London and North Western Railway 3 per cent. Debenture Stock at about 120. That was in 1897. Now mark the dolorous result:—

Dividend on £10,000 of bank stock	£450
Dividend on £10,000 leasehold property	£600
	£1,050
Dividend on £8,900 Consols.	£223
Dividend on £8,300 3 per cent. debenture stock	£249
	£472

The net diminution of income on these transactions was, therefore, £578. Mrs. Gregson had to relinquish her carriage, and it was her outspoken comments upon "poor Tom's mistake in choosing a trustee" that chilled the cordial relations which had existed between her and my wife.

But that is not the worst of it. Here is the present market value of these two carefully selected trustee investments:—

£8,900 Consols at 82 per cent.	£7,298
£8,300 London and North Western Railway 3 per cent Debenture Stock at 92 per cent.	£7,626
	£14,924

Net loss on capital, £5,076; and I have only instanced the investments of part of the estate. Small wonder—though it adds to my bitterness of spirit—that, after I had frustrated the effort of Gregson junior to raise money on his reversion with a view to cattle ranching, he surprised his family by electing to be articled to a solicitor—with a purpose, as he genially put it, of becoming competent to keep an eye on his father's trustee.

There was other property of poor Gregson's which, under a clause in the will permitting us to "retain" existing investments, we did not realise. For example, we held London and North Western Railway ordinary stock, which in that year—1897—reached the price of £209. From that day to this they have paid dividends averaging exactly £6 6s. 7d. per cent. per annum on the nominal capital. If, in that year, you had placed £209 in cash in a leathern bag and had drawn out each year ever since £6 6s. 7d. by equal half-yearly instalments in February and August, you would to-day have in the bag £139 7s. 7d. The value of £100 London and North Western Railway ordinary stock to-day is £135? There are people who say that English railway companies have been paying their dividends out of capital for years past. Nothing that I or anybody else can say is likely to produce the slightest impression upon the companies; nevertheless, the fact remains that the market appraisement of their stock coincides remarkably with the opinion of these perverse critics, and my figures shew that a leathern bag to keep the sovereigns in would have been a better investment thirteen years ago than a purchase of their stock.

"And I also appoint him to be the guardian of my infant children."

I suspect that the lawyer inserted those words as common form, and that Tom passed them as idle verbiage. He must have known Mrs. Gregson's decision of character at

least as well as I do now. Nevertheless, when Netta Gregson, whom I had regarded merely as a big girl with a pigtail, suddenly converted that appendage into a more alluring coiffure and became the subject of local gossip in connection with a young doctor, I was haled in on the strength of this wretched clause and invited to oppose the match. Straightway I became the football of the contending parties, and when, in the end, love prevailed and the engagement became a fact, I had earned the contempt of one party and the resentment of the other.

Do what I can, the income dwindles and the capital dwindles. The whole current of social legislation and economic forces is against me. For twelve years gilt-edged securities have wilted, and look like continuing to do so.

"Try mortgages," says my solicitor, with an alluring eye.

Not I; I have a friend—another trustee—who did try them. He has found that neither the lawyer who investigated the title nor the surveyor who certified the value is any sort of guarantee when the pinch comes. He has become that miserable thing, a mortgagee in possession. He collects rents, ejects tenants, does repairs, complies with county council requirements, and wakes in the night wondering if the fire insurance premium is paid. It is fortunate he has retired from business, as the trust property occupies most of his time. Poor fellow! he asked for a fish and they gave him a scorpion. No mortgages for me, thank you.

And while the stocks dwindle the trust itself ramifies. the daughters' shares are settled on them and their children to come. One son's share is mortgaged to an insurance society, who serve notices on me and have thoughtfully placed a "distringas" on the securities. If young Gregson, above alluded to, meets with the financial disaster which I think—I do not say hope—is in store for him, I shall have his trustee in bankruptcy to reckon with. I see a slow-gathering cloud which is likely to assume alarming proportions. But it is not likely to burst in my time. Mrs. Gregson has one of those gunmetal constitutions which seem to be the prerogative of middle-class widows in comfortable circumstances. It is probable that my executors will have to defend my position when the Gregson trust is wound up.

Naturally enough, the newly created Public Trustee has been suggested as a short and easy way out of my troubles. That philanthropist, however, wants a percentage on the

capital of the estate for taking over the affair, and another percentage per annum for collecting and distributing the income. Opposition to his appointment arose upon a very practical basis. Gregson, junior, speaking for the reversioners, suggested delicately that the precautions in the form of periodical audits and inspections, arranged by the young doctor and himself, had reduced my opportunities for peculation to a minimum, and he saw no reason for depleting capital by the amount required by the Public Trustee. Mrs. Gregson, with admirable terseness, said she saw no reason why she should pay income tax twice over. She thought, too, that the Public Trustee might be found wanting in "elasticity." Elasticity, in this context, is a word of vague and doubtful import. I am disposed to think it indicates a plastic quality affording play for the importunity of widows —a willingness to advance funds prior to the receipt of income, a certain complaisance about putting on boots after dinner to go round and discuss adenoids, school bills, and a suitable career for the youngest Gregson.

The position of a trustee is one neither of honour nor of profit. It involves the responsibilities of wealth without the enjoyment of it. It drags you into other people's affairs. It endangers the provision you hope to make for your own family. It may outlast your health, strength, and ability to cope with it. And it may mean financial disaster for your own estate after you are in your grave.

GEORGE A. MACDONALD.

PIECING TOGETHER TORN PAPER.

Simple as this kind of work appears, yet it no less offers numerous difficulties and is often very awkwardly carried out. An investigating officer often receives torn pieces of paper of small size, not infrequently of the utmost importance when pieced together. For this purpose we procure a plate of glass, or better still some tracing cloth of good quality and transparency stretched on a board and fastened with four drawing pins. The pieces of paper are then set out, preferably on a dark background, and we first try to distinguish the back from the front of the paper, by noting, e.g., whether one side is written on and the other not, or one side is

darker than the other. If possible, the pieces of paper are all placed the same side up. We then look for those pieces which have two clean cut sides and which necessarily form the corners of the sheet. On these being found they are placed in their respective places and give us four very useful fixed points. We then look for all the pieces which have only one clean cut side, and divide them into four groups according to whether the cut edge is on top or at the bottom or the left or right sides. This is as a rule not difficult owing to the writing generally found on the paper. These lateral pieces are placed in position, using the corner pieces for guidance, and with luck an entire frame is obtained into which the remaining pieces are filled in after some adjustment. This done the pieces are gummed on the plate of glass or the tracing cloth, one after the other in the order in which they lie, commencing at the top left-hand corner, care being taken to bring the various edges as close together as possible. While this is being done it must be remembered that the tears are hardly ever perpendicular to the surface of the paper, but are generally directed towards the right on the upper surface of the paper and the left on the lower surface, thus forming an oblique surface of separation. In this case the edges must be exactly slipped in, one under the other. The pieces should, therefore, be only partially gummed at first, and only when the piece which has to be slipped under the first is in position should they be finally gummed down. Never gum to a nontransparent plate even when there is nothing on the back of the paper, for in some cases the inquiry may turn on the question of why there is nothing on the back.

There is another method, which, however, requires much more pains. In this process we use perfectly clean (by preference distilled) water, with which the fragments are carefully moistened before being brought to the right position on a glass plate. They stick with water smoothly and securely to the plate. When this is done, then a second glass plate is laid on the paper of exactly the same size as the glass plate underneath, so that the paper is enclosed between two glass plates. Then follows a thorough drying, the plates not being touched until the water between them is evaporated. Gentle warmth will assist when one goes carefully to work. The plates are then safely and hermetically bound together with pasted slips of soft tough paper.

This is the method used by the director of the Court Library in Vienna, Professor Karabacek, to preserve valuable papyrus records.

If the paper in question has been written with copying ink, care must be taken not to moisten the paper. In that case naturally no good copy can be obtained.

When the paper has been submitted to certain processes rendering it illegible, recourse must be had to photography; this never fails to assist us. A sheet of paper was exhibited at the Chicago Exhibition of 1893, the writing on which had been made quite illegible by rubbing and mastication, side by side with the photograph of the same sheet. The undecipherable traces left on the paper became perfectly legible in the photograph.

The following case will shew how important is the piecing together of torn paper:—

One morning a peasant, an old man of considerable means, came before the investigating officer and declared that he had been shot the night before. He narrated how he had started from a place called St. and had followed the main road through the village of J. with the object of proceeding to G. While passing before a roadside cross, near a forest, a man advanced and demanded of him his money and watch at the mouth of a revolver. The peasant had turned away, whereupon the highwayman snatched his watch and at the same time fired. The bullet entered his right ear. the robber made off, and the peasant remained for a considerable time beside the cross in a state of unconsciousness. On coming to his senses he returned to the village of J to seek the assistance of the doctor of that place. The latter dressed the wound and sent him in a carriage to the hospital. The medical examination revealed a hole produced by a bullet extending from the ear towards the buccal cavity. The peasant having given an exact description of the author of the crime, police were sent out to arrest him, and the investigating officer went off to the scene of the occurrence.

He was then most astonished to notice that the large pool of blood produced while the peasant lay wounded and unconscious on the ground was situated in the turf behind the cross, which was a large stone one, whereas the road where the attack was said to have taken place passed in front of the cross. This circumstance induced the investigating officer, who had no other clue, to repass along the road tra-

versed by the peasant while going to the doctor and take the precaution of being accompanied by a police officer.

Here was found the only clue which might enable some light to be thrown on the concomitant circumstances. When close to J. the investigating officer noticed some small pieces of torn paper behind a heap of stones. The largest of these pieces bore the words "to live." The paper thus seemed to be important, and a search was made for all the pieces of paper. This was by no means easy, the wind having scattered them over a field of stubble. Fortunately the school children turned up on the road and gave willing aid in the search on being promised a kreutzer (2 pies) for each piece of paper. Since the police had arrested two lads on suspicion of the crime, and the injured peasant was on his deathbed, it was necessary to establish with all haste what connection, if any, these pieces of paper had with the case. Half a night's work sufficed to arrange and join the pieces on a glass plate. The contents established that the peasant, overwhelmed by a lawsuit he had just lost, and being, besides, in a bad state of health, had made up his mind to do away with himself; he bade farewell to his wife, by whom he had had no children, leaving her his property, and named as heirs two illegitimate sons. On this writing being shewn to him the old peasant made a complete confession, stating that he had fired the shot himself behind the cross, but on coming to his senses had regretted his act and referred to the doctor at J for assistance. On the way there he had taken care to tear up and throw away the letter of farewell he had previously written, which was to take the place of a will. He died shortly after his confession. The reconstructed document not only gave the two lads who had been arrested their liberty, but also assured the two sons of the peasant, who had never been recognised, a considerable fortune.

In conclusion it may be remarked that one can save paper in a bad condition if one moistens it with a solution to be obtained from dealers in photographic articles. Important papers are often much crumpled also, when kept in damp, dirty places or found near burial grounds or in water, full of bacteria, which soon lead to decay. If such papers are much handed about between lawyers and witnesses, unfolded, smoothed out and folded up again, they soon become unreadable and only an expert can handle them. Treatment

makes the paper strong, solid, and proof against bacteria, in short, so far as regards ordinary handling, almost indestructible.—*Criminal Investigation.*

NOTES OF CASES.

NOTICE OF MOTION TO COMMIT.—It is a remarkable fact that, although the High Court procedure is governed by Rules, many of which have been in force for thirty-five years, there has hitherto been no clear decision on the point whether there is any distinction between a motion for leave to issue a writ of attachment and a motion to commit. The question arises under Order 52, Rule 4, which provides that every notice of motion for attachment shall state the grounds of the application, and that where the motion is founded on evidence by affidavit a copy of the affidavit shall be served with the notice of motion. Rule 7 of Order 42, provides that a judgment to abstain from doing anything may be enforced by writ of attachment or by committal, and its language gives some colour to the argument that a motion to commit is not a "motion for attachment" within the meaning of Order 52, Rule 4. In *Taylor* v. *Plinston,* however, where a notice of motion to commit the defendant was not accompanied by a copy of the affidavit on which the motion was founded, he took the preliminary objection that the service of the notice was invalid by reason of the provisions of Order 52, Rule 4, and Mr. Justice Warrington sustained the objection, holding that the Rule applied to every motion under which the person might be attached and taken into custody. No distinction, he thought, ought to be drawn in construing the Rule between a motion for leave to issue a writ of attachment and a motion to commit. That no such distinction exists has, indeed, been the general opinion of the officials of the High Court for many years.

SURNAMES AS TRADE MARKS.—Plenty of scope for litigation is likely to be afforded by sec. 9 of the Trade Marks Act, 1905, which has introduced the element of judicial discretion in lieu of creating hard and fast statutory classes of registrable trade marks. The scope and object of the section were well explained by the Court of Appeal in *In re Joseph*

Crosfield & Sons, Limited (1910), where the word "Perfection" as a trade mark for soap was refused registration. This was a word not covered by the four statutory clauses, but registrable only by order of the Board of Trade or the Court. Among words which can only be registered with the sanction of the Board of Trade or the Court are surnames used as ordinary words. These, however, "distinctive" they may be, are not to be "deemed distinctive" — that is, "adapted to distinguish the goods of the proprietor of the trade mark from those of other persons"—without this special sanction. What is said to be the first application yet made for leave to have a surname registered as a distinctive mark came before Mr. Justice Warrington on July 28 (*In re Pope's Electric Lamp Co.*) The learned Judge held that the principles laid down in *In re Joseph Crosfield & Sons, Limited,* as to laudatory epithets applied to surnames, and that both were equally "well adapted to distinguish" the goods of one proprietor from the goods of another. This bracketing of surnames and laudatory epithets together is hardly satisfactory, and Mr. Justice Warrington seems to have been conscious of it, for he went on to state his views on the assumption of the surname "Pope" being adapted to "distinguish" one kind of goods from another. Even on this assumption it was held that the Court could not "take into consideration the extent to which" user had rendered "the trade mark in fact distinctive," for to do so would be, "in nearly all cases of names of manufacturers of well-known goods in common use, to direct registration of the name as a trade mark." But surely this was what was intended by the provisions of sec. 9. It would be well if the proper interpretation of this difficult section were further elucidated in the Court of Appeal.

REASONABLENESS AS AN ELEMENT IN CONTRACT.—An interesting discussion on the question of introducing conditions of reasonableness into a contract was cut short in the recent case of *Gamage, Ltd.*, v. *Temple Press, Ltd.*, by a finding by the jury that the defendants' refusal to publish certain advertisements of "cut" prices, which was the grievance complained of by the plaintiffs, was, in fact, reasonable. Hence on the plaintiffs' own shewing, there was no ground of action. The contract on which they sued contained a clause providing that "all advertisement copy shall

be subject to the approval of the publishers," and the plaintiffs maintained that in law the approval must not be unreasonably withheld, supporting their view by the citation of some old cases incorporating "reasonableness" into the consideration of the powers of arbitrators and certain local authorities. We doubt whether the principles laid down in these decisions could properly have been extended to a case of express contract, and the Lord Chief Justice, who tried the case, intimated at an early stage that he had his own view on the point of law, though he would leave to the jury the question whether the refusal to publish was reasonable. To read into such a contract which gave an unqualified right of exclusion, a proviso that the exclusion must be one of which a jury would approve, would be a wide stretch of the powers which some Judges have assumed in dealing with the rights of parties in other contractual relations, *e.g.*, those of lessor and lessee. The cases, like *Young* v. *Ashley Gardens Co.* (1903), which have given to one party to a contract rights of redress against another who acts unreasonably in the assertion, or exercise of his powers, are all based on the inclusion of "reasonableness" as one of the express terms of the contract, and it would be a dangerous thing to hand over to juries generally the right to imply such a condition in every case.

CONTRACTS TO INDEMNIFY BAIL—*Rex* v. *Porter*, [1910] 1 K. B. 369, was a case in the Court of Criminal Appeal, appealed from a conviction on an indictment for conspiracy. One Clark had been committed by Justices for trial at a quarter sessions on a charge of felony. The alleged conspiracy, of which Porter was convicted, consisted of an agreement between himself and Clark and one Brindley that if Porter and Brindley, pending the charge against Clark would go bail for the latter in £50, then Clark would give them £50 each as security, so that they would lose nothing if he absconded. The facts were specially so found by the jury, together with a finding "that the appellant (Porter), in becoming a party to that agreement, did not do so with the intention that Clark should abscond;" and, moreover, the count in the indictment on which the appellant was convicted contained no averment of intent, but a bare statement of the agreement as above related. Jelf, J., in the Court below, held that Porter was guilty of a criminal conspiracy,

and this was affirmed by the Court of Criminal Appeal. Lord Alverstone, C.J., writing the opinion, after citing several cases, said:—

"It is, in our opinion, difficult to conceive any act more likely to tend to produce a public mischief than that which was done in this case. It is to the interest of the public that criminals should be brought to justice, and, therefore, that it should be made as difficult as possible for a criminal to abscond; and for many years it has been held that not only are bail responsible on their recognizance for the due appearance of the person charged, but that, if it comes to their knowledge that he is about to abscond, they should at once inform the police of the fact. It has been suggested to us that the more modern view of bail is that it is a mere contract of suretyship, and that an agreement to indemnify bail, therefore, does not involve any illegality. If that were so, as soon as the bail had got his indemnity, he would have no interest whatever in seeing that the accused person was forthcoming to take his trial, and it is obvious that criminals, particularly if possessed of means, would very frequently abscond from justice. We have been asked to follow the opinion expressed by Martin, B., in *Reg.* v. *Broome,* 18 L. T (O. S.) 19, that there is no objection to the indemnification of bail, which opinion was acted on by the recorder of London in *Rex* v. *Stockwell,* 66 J. P. 376. It is sufficient to say that we do not agree with the opinion of Martin, B. In these circumstances we are of opinion that Jelf, J., rightly held that the agreement entered into by the appellant was an illegal contract, not only in the sense of being unenforceable, but also as being one which clearly tended to produce a public mischief, and that it amounted to a criminal conspiracy, without any necessity for a finding by the jury that there was an intent to pervert or obstruct the course of Justice."

UNCOMMUNICATED SECRET TRUSTS.—A very clear illustration of an elementary rule in the law of trust-devises is afforded by the case of *Vonier* v. *Harris,* heard before Mr. Justice Joyce on June 13th. The plaintiff claimed that, under the will of the late Father Ignatius, the monastery of Llanthony, in Wales, was held by the defendants in trust for him. Father Ignatius had devised the monastery to the defendants in fee simple as joint tenants, and on the same

day as he made his will he executed another document addressed to the defendants, in which he expressed the wish that in certain events the devised property should be conveyed to the plaintiff. The whole, and only, question to be decided in the action was whether this document had been communicated by Father Ignatius to the defendants in his lifetime. Mr. Justice Joyce found that the plaintiff had not proved any such communication, and dismissed the action, holding that the defendants were under no legal obligation to divest themselves of the devised property. It was not thought worth while, apparently, to cite any authority for the proposition of law involved in this decision, and there was no difficulty in coming to the necessary conclusion of fact. Difficulties have, however, arisen in cases of this description, and in particular where the devisees are joint tenants. It may be useful to refer to two of the most recent cases, in one of which the general rule was formulated in the House of Lords. *French* v. *French* is to be found only in the Irish reports—(1902) 1 Ir. R. 172. But the case went to the House of Lords, and on pp. 225 and 230 of the report the rule in question was stated by Lord Halsbury and Lord Davey. Lord Davey's statement is this: "It is now well established, and has been settled since the time of Lord Hardwicke, that if a testator communicates in his lifetime to a proposed devisee or legatee that he has left him his property, and expresses a wish that the property should be disposed of in a particular manner, and the legatee or devisee by acquiescence, or even by silence, accepts that communication, and the testator dies without any repudiation, a trust is fastened upon his conscience, as it is said, and he cannot afterwards appropriate the property to his own use or dispose of it otherwise than in accordance with the wishes which were then communicated to him and which he has accepted." The other case to be mentioned is *In re Stead* (1900). There Lord Justice (then Mr. Justice) Farwell referred to most of the authorities, and to the difference it made (in the case of joint tenants) whether the communication to one of them took place before or after the making of the will.

DUPLICITY OF PLEAS.—In *Rex* v. *Banks* (July 31st, 1911), a full Court of Criminal Appeal was empanelled in order to deal with a very curious situation which the ingen-

uity of counsel for the prisoner had created. The prisoner was charged at the Old Bailey, on a coroner's inquisition, with the murder of a child; he was also charged at the same time upon the indictment of the grand jury with the manslaughter of the same child. To both charges he pleaded "not guilty." Following the usual course where inquisition and indictment clash, the prosecution offered no evidence on the inquisition, and the prisoner was formally acquitted by the jury. Then the Judge asked counsel to defend him on the charge of manslaughter, and the counsel chosen at once asked leave to add a plea of *autrefois acquit* to the plea of not guilty. This the Judge, without discussing the matter, allowed. The prisoner was convicted, and in due course appealed. It is certainly very difficult to avoid the conclusion that *autrefois acquit* is a successful answer to the indictment; for the prisoner had been in peril on the same facts in the same case under the inquisition charging him with murder. The Court, unable to avoid this conclusion, met an unmeritorious technicality by another equally unreal. They held that the two pleas, "not guilty" and "*autrefois acquit*," are alternative, not cumulative, so that the second plea was bad for duplicity. Another difficulty stood in their way, namely, that according to the decision in *Rex* v. *Drury* (3 C. & K. 190), the Judge has a discretion to allow both pleas; and this the presiding Judge had undoubtedly done. But the Court was determined not to strain at a gnat, and so it held, with all solemnity, that the presiding Judge, since there had been no discussion of the question before him, had not exercised his discretion at all in allowing the plea. They, therefore, exercised theirs for him—and disallowed it.

REFORMATION OF INSURANCE POLICY.—In *Niagara Fire Insurance Co.* v. *Jordan* (68 S. E. 611), the plaintiff made an oral contract with an insurance company to insure his property. The policy was subsequently delivered to him, but he put it away without reading it, and did not discover until three months later when the property was burned, that by a mistake of the agent a name other than that of the insured had been inserted as the beneficiary. The Supreme Court of Georgia held that equity would reform the policy so as to make it read as it was intended to read. It said that a failure to inspect the policy, which was in plaintiff's possession for nearly three months, was not such laches and

negligence on his part as to preclude any right of reformation of the policy. The trend of authority is that a mere failure of the insured to read his policy does not amount to such laches as will debar him from having such policy reformed for mistake therein. A policy of insurance is issued by the insurer and signed by him or his agent. It is not contemplated that the insured shall sign it. In the insurer's promise to deliver an accurate policy, according to his oral agreement with the insured, the insured had a just expectation that there will be no designed variance. A man should not be permitted for his pecuniary advantage to impute it to another as gross negligence that the other trusted to his fidelity to his promise. The case is quite different from those instances where a man, who has negligently signed a contract, endeavours to be relieved of its obligation by setting up his own negligence. "There is no rule of law which fixes the period within which a man may discover that a writing does not express the contract which he supposed it to contain, and which bars him of relief for delay in asserting his rights, short of the period fixed by the statute of limitations."

This decision is in line with an Illinois case, (*Home Insurance Company* v. *Myer* 93 Ill. 272), where a man applied to an insurance company for a policy on his house, No. 59 Milwaukee avenue, and the agent examined the premises and an oral contract to insure the house was entered into, and the written policy subsequently delivered. The house being afterwards destroyed by fire, it was discovered that the policy as issued described it as No. 57 Milwaukee avenue. In a suit at law on the policy A. could not have recovered for he could not prove that 57 Milwaukee avenue had been destroyed, nor could he prove by oral evidence that the parties had intended to insure No. 59 and not No. 57—because this was contrary to the rule that a written agreement cannot be varied or contradicted by parol. But the Supreme Court held that a Court of Equity would correct or reform the policy so as to express the real intention.

EXECUTORS AND TRUSTEES.—To appoint any private person a sole trustee is always regarded as an extremely dangerous thing—for the trust estate. The Court itself acts on this

rule inflexibly. Most testators fondly imagine that, just as they consult the interests of their donees by appointing two or more trustees, so these donees' interests are also best served by the appointment of two or more executors. The fact is, of course, as all lawyers know, that there is not the same element of safety in appointing two executors as there is in appointing two trustees. One of two executors may do things with perfect legal propriety which one of two trustees cannot do. This distinction between executors and trustees, that executors can deal with their testator's estate when trustees cannot, is a curious one. In the region of real property law it has given rise to litigation with respect to making title to leaseholds, and occasionally the goodness or badness of a title under a sale by executors has turned on rather minute questions of fact. The undoubted authority, however, of executors—together or singly—to dispose of their testator's personal chattels at any length of time after his death, and irrespectively of the existence of any debts to be paid off, received an excellent illustration recently in the case of *Solomon v. Attenborough* (May 20th), heard before Mr. Justice Joyce. A testator died in 1878, having appointed two executors. In 1892 one of the executors pledged certain plate belonging to the testator's residuary estate with the defendants, who are pawnbrokers. Long before 1892 all the testator's debts had been paid, but the residuary estate had not been distributed or even completely realized. The pawn-tickets being found among the executor's papers on his death, the present trustees of the will took proceedings to recover the plate from the defendants. It was urged on behalf of the plaintiffs that the deceased executor had before 1892 become a joint trustee of the plate and thus his power as executor to sell or pledge it had determined. Mr. Justice Joyce decided otherwise, and held that the defendants were entitled to their lien on the plate pledged to them as pawnbrokers, the action against them being, therefore, dismissed with costs. The learned Judge thought there was nothing in the cases relating to the sale of leaseholds by executors which prevented his laying down the rule that there was no limit to the period of time during which an executor might exercise his ordinary power to sell or pledge personal chattels.

IMPORTANCE OF THE LEGAL ESTATE.—Once again is the practitioner reminded of the vital importance, to any pur-

chaser or mortgagee who would wish to be able to rely on a plea of purchase without notice, of having the legal estate decisively vested in himself. This is the lesson to be learned by the conveyancer from the recent and extremely unpleasant case of *Lloyd v. Grace Smith & Co.*, in which the Court of Appeal reversed the judgment of Scrutton, J., and held that the defendant (a solicitor) could not be held liable for frauds perpetrated by his clerk against the plaintiff, who was one of the defendant's clients. The decision is one more immediately concerning the law of principal and agent; but the method of perpetrating the frauds is of considerable interest from a conveyancing point of view. This method consisted in getting the plaintiff to convey her property to the fraudulent clerk, who then disposed of it to persons who took without notice and from whom it could not be recovered. Freehold land was thus conveyed, and a mortgage in fee was transferred the clerk in each case getting the legal estate vested in himself. The purchaser in one case, and the transferee of the mortgage in the other, dealt with the person in whom the legal estate was vested, without notice of any conflicting equitable interest, and so secured for themselves the impregnable position gained by the possession of the legal estate. It has been said to be doubtful whether the rule conferring this enormous importance and value of the legal estate is justifiable at the present day, and that historically the rule has become indefensible since the Judicature Acts. It has also been doubted whether the chief function of the rule—to decide which of two innocent persons is to bear an inevitable loss—could be better performed by some other means. Into these speculations the practical lawyer is not likely to be led very far. Enough for him that the possession of the legal estate will turn the scale in favour of that one of the two innocent sufferers who has been lucky enough to secure it. That rule as to the legal estate giving priority is a living part of English law, as dealt with every day in solicitors' offices and counsels' chambers, one is forcibly reminded by such a case as this.

RECENT DECISIONS OF THE PRIVY COUNCIL.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

(LORD LOREBURN L.C., LORD HALDANE, LORD MACNAGHTEN, LORD SHAW, LORD DE VILLIERS AND LORD ROBSON.)

[JULY 13TH, 1911.

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA v. FEDORENKO.*

Canada—Extradition—Treaty With Russia — Arrest Without Formal Requisition From Foreign State—Validity.

Article VIII. of the Extradition Treaty with Russia provides that a requisition for extradition shall be made through the diplomatic agents of the high contracting parties, and Article IX. provides that, after the requisition, the authorities of the State applied to shall proceed to the arrest of the fugitive.

Held, that there was no inconsistency between the provisions of the Canadian Extradition Act and the provisions of the treaty with Russia, and that Article IX. did not involve that there can be no arrest of a fugitive for the purpose of extradition until there has been a formal requisition under Article VIII.

This was an appeal by special leave from a judgment of Mr. Justice Robson in the Court of King's Bench for Manitoba, of December 17th, 1910, by which it was decided that the respondent, who had been committed to prison as a fugitive criminal under a warrant of committal of Chief Justice Mathers, with a view to his extradition to Russia, was entitled to be discharged from custody.

Sir Robert Finlay, K.C., *Mr. E. L. Newcombe,* K.C., (of the Canadian Bar), and *Mr. Theobald Matthew,* appeared for appellant.

*27 L. T. R. 541.

In the course of 1909, the Canadian Minister of Justice received a letter from the Russian Consul stating that the Russian Government had instructed him to have the requisite measures taken for the arrest and extradition of two Russian subjects, one of whom was the respondent, who were said to be domiciled in Winnipeg. On September 26th, 1910, Chief Justice Mathers, of Manitoba, as a Judge under the Extradition Act, 1906, issued a warrant for the arrest of the respondent, who was thereupon brought before him. The proceedings were based upon an information sworn by a police officer at Winnipeg, the charge being one of murder, alleged to have been committed in Russia, in January, 1908. After hearing evidence the Chief Justice decided that the respondent should be surrendered under the Extradition Act, and issued a warrant of committal for the delivery of the respondent into the custody of the keeper of the gaol at Winnipeg.

In the course of the proceedings before the Chief Justice it was not proved that any requisition for the arrest of the respondent had been made in accordance with Article VIII of the Extradition Treaty with Russia.

On October 20th, Mr. Justice Robson, after hearing counsel for the respondent, ordered the issue of a writ of *habeas corpus,* and in November, a motion was made before the Judge for the discharge of the respondent. It was argued on his behalf that the absence of proof that a requisition for his extradition had been made under Articles VIII and IX of the treaty invalidated the warrant of committal. Mr. Justice Robson agreed with that argument and ordered his discharge from custody, and he was accordingly released.

Sir Robert Finlay, for the appellant, said, that this was an appeal from an order releasing on *habeas corpus* a man who had been arrested in Canada on a charge of murder, alleged to have been committed in Russia. He was a Russian subject, and he was arrested on proceedings under the Canadian statute. Mr. Justice Robson was of opinion that the treaty had not been complied with, and on that ground he discharged the man. The point was one of very great general importance relating to the manner of carrying out extradition in Canada. The warrant for the arrest of the man was issued by the Chief Justice, under sec. 10 of the Extradition Act of Canada, which was in the following terms:—

Whenever this part applies, a Judge may issue his warrant for the apprehension of a fugitive on a foreign warrant of arrest, or an information or complaint laid before him and on such evidence or after such proceedings as in his opinion would, subject to the provisions of this part, justify the issue of his warrant if the crime of which the fugitive is accused, or of which he is alleged to have been convicted, had been committed in Canada. The Judge shall forthwith send a report of the fact of the issue of the warrant, together with certified copies of the evidence and foreign warrant, information or complaint, to the Minister of Justice.

The ground on which the release was ordered was under sec. 3, which said:—

In the case of any foreign State with which there is an extradition arrangement, this part shall apply during the continuance of such arrangement; but no provision of this part, which is inconsistent with any of the terms of the arrangement, shall have effect to contravene the arrangement, and this part shall be so read and construed as to provide for the execution of the arrangement.

Articles VIII and IX of the Extradition Treaty were as follows:—

The requisition for extradition shall be made through the diplomatic agents of the high contracting parties respectively. The requisition for the extradition of an accused person must be accompanied by a warrant of arrest issued by the competent authority of the State requiring the extradition, and by such evidence as according to the laws of the place where the accused is found, would justify his arrest, if the crime had been committed there . . . If the requisition for extradition be in accordance with the foregoing stipulations, the competent authorities of the State applied to shall proceed to the arrest of the fugitive.

In this case Sir Robert Finlay contended the accused was arrested without any requisition, and the law of Canada was advisedly framed in that way for the reason that it was found that if they waited for a requisition in the usual diplomatic way, a criminal would escape, and it was necessary to provide for his being arrested at once, the requisition, however, being necessary before he was handed over to the authorities of the State which desired to deal with him as a criminal. Mr. Justice Robson had said that the Act was

inconsistent with the treaty. It was impossible to read sec. 3 of the Act as in effect an enactment, that in no case should Canada proceed to arrest of foreigners in her jurisdiction until a requisition had been made. He submitted that there was nothing whatever inconsistent with the right of Canada to arrest without requisition, with a view to extradition in Canada, they found that unless they could take proceedings at once it was very little use, for, having regard to the extensive frontier, a man was very likely to disappear. Russia did not consider that the treaty had been violated.

The Lord Chancellor, in delivering judgment, said: "The only question in this appeal is whether the absence of a requisiton by the Russian Government for extradition vitiated the proceedings under which this accused was arrested and committed for surrender. Mr. Justice Robson held that these proceedings should be founded upon a certain preliminary requisition, and that, therefore, as there was not such a preliminary, the accused shou'd be discharged. His reason was that upon his construction of the treaty with Russia, this condition had to be complied with, and that in so far as the Canadian Extradition Act (ch. 155 of Revised Statutes, 1906), was inconsistent with that treaty, the treaty must prevail.

Their Lordships are of the opinion that what was done in the arrest and committal was in accordance with sec. 10 of the Extradition Act, and that there is no inconsistency between the Act and the treaty. The treaty provides by Article IX, that after a requisition in due form, the authorities of the State applied to shall proceed to the arrest of the fugitive. In that case the proceedings to arrest is obligatory. The Article does not provide that there shall be no arrest till after a requisition. Their Lordships desire to say that nothing has come before this board, except this point of law. The other rights of the accused and of the State remain wholly unaffected.

Their Lordships will humbly advise his Majesty that this appeal should be allowed, and that the order of Mr. Justice Robson, dated December 17th, 1910, should be discharged.

Solicitors: *Charles Russell & Co.*

SUPREME COURT OF CANADA.

[MAY 8TH, 1911.

JOHNSTON v. THE KING.

Petition of Right—Contract—Powers of Commissioners of the Transcontinental Railway — Liability of Crown — Construction of Statute—3 Edw. VII., ch. 71.

"The National Transcontinental Railway Act," 3 Edw. VII., ch. 71 (D.), does not confer powers upon the Commissioners of the Transcontinental Railway in respect to the inspection and valuation of lands required for the purposes of the "Eastern Division" of the railway; consequently, a petition of right will not lie for the recovery of remuneration for services of that nature.

Judgment appealed from (13 EX. C. R. 155), affirmed, Idington, J., dissenting.

Appeal dismissed with costs.

M. G. MacNeil, for appellant.
Newcombe, K.C., for respondent.

[MAY 15TH, 1911.

CITY OF WOODSTOCK v. OXFORD COUNTY.

Municipal Corporation—City and County — Separation—Agreement as to Assets—Subsequent Discovery of Funds not Included—Action for City's Share

In 1901 the Town of Woodstock was incorporated as a city, and in February, 1902, the city and the county of Oxford entered into an agreement, ratified by their respective by-laws, purporting to settle all questions between them arising out of the erection of the town into a city. This agreement was acted upon until December, 1907, when the city, claiming to have discovered the existence of a fund of $37,000, collected from the ratepayers of the several municipali-

ties composing the county, which had not been considered in the settlement, brought action for its share of said fund, but did not ask for recission or modification of the agreement.

Held, affirming the judgment of the Court of Appeal (22 O. L. R. 151), that in the absence of fraud or mutual mistake the agreement was a bar to such action.

Appeal dismissed with costs.

Watson, K.C., for appellant.
Bicknell, K.C., and *S. G. McKay,* for respondent.

[MAY 15TH, 1911.

LAIDLAW v. VAUGHAN-RHYS.

Timber License—Crown Lands in British Columbia—Real Estate — Personalty — Contract — Sale — Exchange — Consideration—Payment in Joint Stock Shares—Vendor's Lien—Evidence—Onus of Proof — Pleading and Practice.

A sale of rights under licenses to cut timber on provincial Crown lands in British Columbia, is a contract for the sale of interests in real estate, and the timber berths are subject to a vendor's lien for the unpaid purchase-money.

The doctrine of a vendor's lien for unpaid purchase-money is applicable to every sale of personal property over which a Court of Equity assumes jurisdiction. *In re Stuckley* ((1906), 1 Ch. 67), followed.

In order to protect himself against the enforcement of a vendor's lien, a defendant relying on the equitable defence of purchase for value without notice, is bound to allege in his pleadings and to prove that he became purchaser of the property in question for valuable consideration and without notice of the lien. *In re Nisbett and Potts' Contract* ((1905), 1 Ch. 391; (1906), 1 Ch. 386), followed. *Whitehorn Brothers* v. *Davison* ((1911), 1 K. B. 463), distinguished.

(Leave to appeal to the Privy Council was refused on the 29th of July, 1911.)

Appeal dismissed with costs.

Nesbitt, K.C. and *Coutlee*, K.C., for appellant.
J. Travers Lewis, K.C., for respondent.

ALTA.] [MAY 15TH, 1911.

ALBERTA RY. & IRRIGATION CO. v. THE KING.

Irrigation—Obstruction of Highways—Bridges — Construction of Statutes.

The North-West Irrigation Act, 1898 (61 Vict. ch. 35), provided by sec. 2 (*b*), that companies incorporated for the construction and operation of works contemplated by that statute should submit their scheme of works to the commissioner of Public Works of the North-West Territories, and apply to him for permission to construct and operate the works across road allowances and surveyed public highways which might be affected by them; by sec. 16, that his approval of the scheme and permission for construction across the road allowances and highways should be obtained previous to the authorization of the works by the Minister of the Interior, and by sec. 37, that, during construction and operation of the works, they should "keep open for safe and convenient travel all public highways theretofore travelled as such, when they are crossed by such works," and construct and maintain bridges over such works. The commissioner had the control of all matters affecting changes in or obstructions to road allowances and public highways vested in the local Government "including the crossing of such allowances or public highways by irrigation ditches, canals or other works." On the approval of the scheme of works in question, the commissioner granted permission for their construction and maintenance across the road allowances and public highways shewn in the memorial of the appellants subject to "the provisions of sec. 37 of the said "North-West Irrigation Act," and without any special conditions imposed.

Held, reversing the judgment appealed from (3 Alta. L. R. 70). The Chief Justice and Idington, J., dissenting, that the absolute statutory duty imposed upon the appellant company by sec. 37 of "The North-West Irrigation Act, 1898," related solely to public highways, which were publicly travelled as such, previous to the construction of the irrigation works, by the company; that, as no further obligation was imposed at the time permission for the construction of the works was granted, by the officer in whom the power of specifying further conditions was vested, the company was under no obligation to erect bridges across their works at points where they crossed road allowances or public highways which had become publicly travelled as such, since the construction of the works.

Per Davies and Duff, JJ.

In the construction of modern statutes conferring compulsory powers, including powers to interrupt the exercise of public rights, questions as to what conditions, obligations or liabilities are attached to or arise out of the exercise of such powers are primarily questions of the meaning of the language used or of the proper inferences respecting the legislative intention touching such conditions, obligations and liabilities to be drawn from a consideration of the subject-matter, the nature of the provisions as a whole, and the character of the objects of the legislation as disclosed thereby.

Appeal allowed with costs.

Ewart, K.C., and *E. F. Haffner*, for appellants.
S. B. Woods, K.C., for respondents.

[JUNE 1ST, 1911.

CROWN LIFE INS. CO. v. SKINNER.

Appeal—Final Judgment—Action for Commissions—Judgment for Plaintiff—Reference—Further Directions and Costs Reserved.

In an action against an insurance company by the executrix of an agent for commissions on policies and renewals

alleged to have been earned by testator, the trial Judge gave judgment for the plaintiff, ordered an account to be taken and reserved further directions and costs. His judgment was sustained by the Court of Appeal.

Held, Fitzpatrick, C.J., dissenting, that the judgment of the Court of Appeal was not a final judgment for which an appeal would lie to the Supreme Court of Canada.

Appeal granted with costs.

G. F. Henderson, K.C., for plaintiff.
Mowat, K.C., contra.

[JUNE 1ST, 1911.

FRANCIS KERR CO. v. SEELY.

Lease—Water Lots—Status of Lessee—Injunction.

S. is a lessee under lease from the city of St. John, of a water lot in the harbour, and F. K. Co., are lessees of the next lot to the south, and there are other lots to the south between that of S. and the foreshore of the harbour. By his lease S. has a right of access to and from his lot on the east and west sides.

Held, reversing the judgment appealed against (40 N. B. Rep. 8), Idington, J., dissenting, that S. was not a riparian owner and had no rights in respect of his lot, other than those given him by his lease. Hence, he could not restrain the adjoining lessee from erecting a wharf on his own lot, which would cut off access to that of S. from the south, a right of access not provided for in his lease.

Appeal allowed with costs.

Hazen, K.C., and *Baxter*, K.C., for appellant.
Teed, K.C., and *Wilson*, K.C., for respondent.

IN THE EXCHEQUER COURT OF CANADA.

General Rule and Order

In pursuance of the provisions contained in the 87th section of "The Exchequer Court Act" (R. S. 1906, ch. 140) and amendments thereto, it is hereby ordered that the following Rule in respect of the matters hereinafter mentioned shall be in force in the Exechequer Court of Canada:—

1. Rule 212 of the General Rules and Orders of the Exchequer Court of Canada of the 11th day of January, A.D. 1909, is hereby amended, by adding thereto the following proviso:—

Provided, however, that in any case in which the Registrar of the Exchequer Court of Canada is acting as Referee, he may, in his discretion, dispense with a transcription of the evidence taken before him as such Referee, and file his report without the same being accompanied by a copy of the evidence; but the discretion hereby conferred upon the Registrar while acting as Referee shall not be held to restrict or in any way interfere with the rights of any party to a proceeding to obtain, under the provisions respecting "Shorthand Writers" in schedule Z6 to these Rules appended, a transcript of the evidence taken before him as such Referee.

Dated at Ottawa, this 12th day of June, A.D. 1911.

W. G. P. Cassels,
J.E.C.

CANADIAN NEWS.

Hon. Horace Archambault, Puisne Judge of the Court of King's Bench, Montreal, has been appointed Chief Justice in Quebec province to succeed Sir Louis Jette, who has been superannuated.

Mr. Honore Gervais, K.C., M.P., Montreal, has been appointed to the vacancy created by the promotion of the Hon. Horace Archambault.

Sir George Gibbons, K.C., London, Mr. Aime Geoffrion, K.C., Montreal, and Hon. A. P. Barnhill, of St. John, N.B., have been appointed members of the International Waterways Commission.

Rupert M. Rive, barrister, St. John, N.B., was married on 1st July at London, England, to Miss Florence A. Alcock.

Alexander Stewart, K.C., Edmonton, has opened a branch office at Athabasca Landing, Mr. John Harris, a Scotch solicitor, being in charge.

L. J. Lennox, lately of the law firm of Gordon and Lennox, Indian Head, has become associated with G. N. Broatch, the new firm being known as Broatch & Lennox.

T. P. Hunter, formerly with the law firm of MacDonald, Killam & Farris, Vancouver, has entered into partnership with R. M. Maitland.

E. J. Hodgson, formerly Master of the Rolls and assistant Judge of the Supreme Court of Prince Edward Island, died recently at Charlottetown. The late Judge Hodgson was on the Bench from 1891 to 1910, when he was superannuated.

The law firm of O'Brian and Hall, L'Orignal, has been dissolved, each partner intending to practise alone. Mr. Hall has opened an office at Vankleek Hill, where he will take over the practice of Mr. J. A. MacInnes, who has gone to Vancouver.

F. J. Sutton, barrister, St. John, N.B., has removed to Winnipeg, where he will practise in future.

J. H. Hearn, K.C., died at Sydney, N.S., on the 9th August.

A. E. Bowles has withdrawn from the Winnipeg law firm of Bowles, Taylor and MacAlpine.

Hon. F. P. Brodeur, K.C., has been appointed Puisne Judge of the Supreme Court of Canada in the room and stead of the Hon. Desire Girouard, deceased.

Hon. R. Lemieux, K.C., has been appointed Minister of Marine and Fisheries of Canada.

Ernest F. Gunther, barrister, Toronto, has been appointed Superintendent of Insurance for British Columbia.

J. M. Clark, K.C., was the representative of the Ontario Bar Association at the meeting of the American Bar Association held in Boston on 29th August.

Commissioner Henderson of the Yukon will on his retirement return to practise at Vancouver.

O. R. Regan has commenced practice at Craik, Sask.

Charles J. Thompson, barrister, has commenced practice at Chatham, N.B.

McGregor Young, K.C., and John King, K.C., have been re-elected lecturers in the Ontario Law School for the ensuing three years and C. C. Robinson has been appointed demonstrator in office work.

Thomas E. McKee, barrister, North Bay, has been appointed Crown Attorney for Nipissing District in the place of A. G. Browning who has resigned.

R. R. Ritchie, High Sheriff of St. John's City, N.B., formerly an active member of the St. John's Law Society and a barrister of over twenty-five years standing, died recently at St. John. A resolution of sympathy was adopted at the meeting of the St. John's Law Society held on the 1st of August.

A. E. Bowles has withdrawn from the law firm of Taylor, Bowles & MacAlpine, Winnipeg, intending to practise alone.

O. D. Hill has commenced practice at Melfort, Sask.

A. C. Grant, barrister, Durham, has removed to Edmonton, where he will practise in future.

His Honor Judge L. W. Sicotte, Montreal, died on the 6th September.

H. A. Stewart, barrister, Nelson, was recently found dead in the vicinity of that town.

Under the name of Maclennan and Baker a legal partnership has been formed at Montreal between F. S. Maclennan, K.C. and W. A. Baker.

J. A. Macdonald, barrister, Charlottetown, who for some time has been Stipendiary Magistrate there, died on the 28th August.

A. L. Belyea, K.C., Vancouver, died on the 22nd August.

Ronald McVicar, barrister, Sydney, was married on the 3rd August to Miss Edith McVicar of Pt. Morien.

Ed. Brice has commenced practice at Edmonton.

W. Beynon, barrister, Estevan, has removed to Moose Jaw, where he will practise in future.

C. A. Tufts, of the law firm of Shaffner & Tufts, Kentville, N.S., has removed to Saskatoon where he will continue practice. B. W. Russell, barrister, Halifax, will be associated with Mr. Shaffner under the firm name of Shaffner & Russell.

His Honor Judge Carleton, was married at Woodstock, N.B., on the 7th September, to Miss Annie J. McKeen.

R. B. Matheson, K.C., of the law firm of Nelles, Matheson & Thompson, Ottawa, died on the 9th September.

When the Hon. Mr. Justice Gervais took his seat in the Court of King's Bench, Appeal side, Montreal, on the 5th September; he was congratulated by Mr. R. A. Brown, K.C., batonnier of the Montreal Bar.

Barnet and Graham, barristers, have commenced practice at Daysland, Alberta, in the office formerly occupied by E. H. Dawson, who has retired on account of ill health.

The fourth annual meeting of the law students of Regina was held on the 12th September.

The
Canadian Law Times.

VOL. XXXI. NOVEMBER, 1911. No. 11.

NATURALIZATION.

For the discussion of the difficult subject of naturalization, very special preparation is necessary, and we must not blame the premiers who met at the recent Imperial Conference, if, owing to the multitude of their pressing engagements, they found themselves obliged to discuss that which they had been unable to study. The conclusions which they arrived at are of very disputable value, and as they are to be used as *aides memoire* for drafting a bill to be submitted to the British parliament, it is very necessary that they should be properly understood and thoroughly discussed in Canada. The three important paragraphs are as follows:—

"(1) Imperial nationality should be world-wide and uniform, each Dominion being left free to grant local nationality on such terms as its legislature thinks fit."

"(4) The imperial act should be so framed as to enable each self-governing Dominion to adopt it."

"(5) Nothing now proposed would affect the validity and effectiveness of local law regulating immigration and the like or differentiating between classes of British subjects."

The proposal is that we are to have two sorts of nationalized British subjects. British legislation is to give "world-wide" status. Canadian naturalization is to have local effect only. Certain men are to be British everywhere, and others are to be British in particular places. Some naturalized Americans, for example, are to remain British while they travel from Toronto to Winnipeg via Chicago, while others are to change their nationality twice during the trip. Sir Wilfrid Laurier said that he had hoped that the conference would do a little better than that.

The premiers seem to have misunderstood the present situation. They appear to have assumed (1) that naturalization under the British statute (1870) was now "world-wide," and (2) that the colonies had no authority to do anything which would have any effect beyond their own limits. Sir Wilfrid expressed the general view, when he said:—

"The power which is given to Canada, to New Zealand, and to all the self-governing Dominions is one limited each to its own territory. . . If a man . . . comes to Canada, and conforms to our laws of naturalization he becomes a British subject *quoad* Canada alone. He is a British subject so long as he remains in Canada; but the moment that same man goes out of the territory of Canada, if he comes from Denmark he is a Dane. . . . So he has a divided allegiance; he is a British subject in Canada, if naturalized in Canada, and he is a British subject in Australia if he is naturalized in Australia, and so on; but he remains a citizen of his native country the moment he is out of the Dominion of his naturalization."[1]

On the other hand the premiers assumed that naturalization in the United Kingdom was world-wide—that it was effective "everywhere."[2] I believe that both of these views are quite erroneous and that the proposed legislation would not only be absurd, but that it would very seriously interfere with Canada's present legislative authority.

THE GENERAL LAW:—To explain the situation a few words of general application must be permitted. Observe that a change of nationality—a change in national status—is the product of the laws of two countries.[3] The law of one country must permit the termination of the old allegiance, and the naturalization law of the conferring country must be complied with. One state may enact as it pleases with reference to the naturalization of aliens, but all it can do (without the assent of the other interested power), is to give to aliens certain privileges while they are within its own jurisdictional limits. It is absolutely powerless to effect status elsewhere.

Sometimes the laws of two countries are dissimilar and produce double nationality. For example, the fundamental

[1] Proceedings, p. 252; and see Proceedings Col. Confer. 1907, p. 179. The Premiers may have relied upon the report of the British Interdepartmental Committee of 1908 (Cd. 4746-1), which, upon this point, is most misleading.

[2] *Ibid.*

[3] Int. Law Assn., 23rd Report, pp. 211-230.

common law principle of British law is the *jus solis*—all born within British dominions are British, and all born elsewhere are aliens. The laws of some other countries, however, are based on the principle of the *jus sanguinis*—all born of subjects are subjects, and all born of aliens are aliens. When therefore a child is born in England, of say French parents, he is both British and French. The courts of these countries would respectively so hold, and nobody can say what a Russian court would make of the tangle.

The same anomaly afforded (prior to the convention of 1870), a perennial source of difficulty between the United Kingdom and the United States. The latter asserted that "the right of expatriation"—that is the right of a man, of his own motion and without the concurrence of his government, to throw off his allegiance—"is a natural and inherent right of all people, and indispensable to the enjoyment of the right of life, liberty and happiness."[4]

The United Kingdom held contrary opinion, with the result that thousands of persons had double nationality, and that nobody knew which of the two nationalities would be acknowledged outside the limits of the two contending countries.

WORLD-WIDE NATURALIZATION:—It will, therefore, be seen that there is no such thing as the creation, by the action of one country alone, of world-wide nationality. Every naturalization statute is necessarily limited in its effect to the territory over which the enacting legislature has jurisdiction. World-nationality can rest only upon the concurrence of world-law.

The declaration of the conference, therefore, that "imperial nationality should be world-wide" (with the intended meaning that British naturalization in pursuance of British legislation should be effective throughout the world), is clearly erroneous. No imperial statute can give it that character, because no imperial statute has any effect beyond the limits of the jurisdiction of the imperial parliament. The rest of the world is governed by its own statutes and comities, and an alien naturalized in the United Kingdom may or may not continue to be an alien elsewhere. That is a matter of foreign and not of British law. As Bruges has said:—

[4] Declaration of Congress of 1868. See Westlake on International Law (Peace), p. 219.

"It is a fundamental principle essential to the sovereignty of every independent state, that no municipal law, whatever its nature or object, should, *proprio vigore*, extend beyond the territory of the state by which it is enacted."[5]

This being the general law, observe next that the British parliament does not assume to make laws effective in foreign countries—that it does not assume (as the premiers thought) to create world-wide nationality. Indeed the statute now in force (1870), has in it very express limitation. It is as follows:—

"An alien to whom a certificate of naturalization is granted shall *in the United Kingdom* be entitled to all political and other rights, powers and privileges, and be subject to all obligations to which a natural born British subject is entitled or subject in the United Kingdom—with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject, unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty or convention to that effect."

Question having arisen as to the construction of this statute, and particularly as to the position in the colonies (under it or under a previous statute) of persons naturalized in the United Kingdom, the Colonial Secretary addressed to the colonial governors a circular (10th September, 1874), in which he said:—

"Her Majesty's government are advised that the operation of the above enactments is clearly confined to the United Kingdom, and that a certificate of naturalization granted under either of the Acts of 1844 or 1870, confers upon an alien no rights or privileges in a British colony."[6]

Three points, therefore, are very clear: (1) the British parliament has no power to make nationality world-wide; (2) it has never assumed to do it; and (3) naturalization in the United Kingdom has at the present time no effect in Canada.

CANADA'S JURISDICTION:—In what respect now, does the position of Canada differ from that of the United Kingdom? In one unimportant point only, namely, that while the British parliament has nominally the power to confer status

[5] Col. and For. Law (1908), Vol. II., p. 1.
[6] Piggott on Naturalization, Vol. 1., p. 129.

in Canada, Canada has no power to confer status in the United Kingdom. I say that the difference is unimportant, because the British parliament has not (as we have just seen) assumed to legislate for Canada, and without Canada's consent (which ought never to be given) no attempt will be made to do so.

Canada is not under any special limitation—as assumed at the Conference. Her authority is to be found in her constitution which gives to the Dominion power to legislate with reference to "naturalization and aliens." The grant is unlimited. It covers the whole department of those subjects of jurisdiction. Its effect was referred to by Sir Wilfrid Laurier at the recent conference as follows:—

"The British Government in granting the constitutions of the several dominions has parted with this power of sovereignty and delegated it to the dominions."[7]

In other words, the authority which the British parliament had with reference to naturalization in Canada has been transferred to Canada, and legislation, therefore, by the United Kingdom upon the subject would be a palpable invasion of our constitution.

The premiers may have been misled (like other people) as to the extent of the jurisdiction of the Canadian parliament by a clause in the British statute of 1820, which is as follows:—

"All laws, statutes and ordinances which may be duly made by the legislature of any British possession for imparting to any person the privileges or any of the privileges of naturalization, to be enjoyed by such person within the limits of such possession, shall, within such limits, have the authority of law."

But that statute has no reference to Canada. It applies to possessions which theretofore had no such authority, or whose authority to confer naturalization, even within their own limits, was doubtful. Canada was in neither of these categories. The statute could not have been intended to apply to her. And if it did, it cannot be construed as an amendment of the Canadian constitution, or as a subtraction from the authority of the Canadian parliament.

The British and Canadian parliaments are in the same situation. The legislative jurisdiction of neither of them

[7] Proceedings, p. 252.

extends to foreign countries; by the Canadian constitution the British parliament has abandoned the right to pass laws with reference to naturalization effective in Canada, and has never assumed to do it; and Canadian legislation has no force in the United Kingdom. Both British and Canadian naturalization is, at the present time, local; and outside their respective jurisdictions, the recipients of it resume their old nationality.

COMPLETE NATURALIZATION:—Is there then no such thing as complete naturalization? Is it the fact that the new status must specifically, or, in its operation in reality, be confined to the limits of the conferring state? If a country's laws cannot be effective outside its own limits, must naturalization always be local?

No. We must make sharp distinction between the power of a state to give legislative effect to its statutes in a foreign country, and the power to create rights or status which by treaty, by statute, or by comity, a foreign state will recognize and give effect to. The United Kingdom and Canada are alike powerless to declare that an alien shall, in foreign countries, be a British subject; but both of them can declare that an alien shall be a British subject; and under treaty, or otherwise, foreign countries will (if the case be a proper one) recognize the validity of the declaration.

It is, in one sense, quite right to say (as did the British Inter-departmental Committee of 1908)[8] that "a colonial legislature can only legislate for its own territory, and the operation of any colonial law is necessarily restricted to the boundaries of the colony;" but colonies are not exceptional in this respect, for *no* parliament has jurisdiction beyond its jurisdictional limits. And, in another sense, the statement is not true of any parliament. For example, Canadian law regulates the rights of persons contracting in Canada, although the litigation about it takes place abroad. In other words, although Canadian law has, of its own force, no operation outside Canada, yet foreign courts, in all proper cases, recognize that the law gives to certain persons certain rights enforceable according to Canadian law in all foreign countries.

Elucidation of the point which I am endeavoring to explain may be helped by reference to the analogy supplied

[8] Cd. 5746-1, p. 238.

by the subject of marriage. Canada's marriage laws are not, of course, in force in the United States, but if, by a proper proceeding under a Canadian statute, a marriage is solemnized in Canada, the status of the wife as a married woman will be recognized by all United States courts. Canadian corporation law furnishes another analogy. The operation of the colonial law is, in one sense, "necessarily restricted to the boundaries of the colony," but if a Canadian company engages in business in the United States, the status conferred upon the company by Canada will be recognized and upheld.[9] The application of these analogous cases to naturalization is obvious.

LOCAL NATURALIZATION:—The next point is perhaps a little difficult, but I hope to make it intelligible. Suppose that France gave to certain persons status as a corporation "in France;" and that the corporation asked recognition in a foreign country, what would happen? The foreign courts would recognize all that there was to recognize, namely, that the corporation was a corporation "in France." But there could, of course, be no recognition of status in the foreign country, because there is none to recognize.

For the same reason if France were to declare that a theretofore alien was a French citizen "in France," very clearly he would remain as he was everywhere else. On the one hand France cannot by her own legislation create world-wide naturalization; but, on the other hand, if the nationality which she herself confers is of limited character (limited either as to time or locality) no wider or greater French nationality can be added to it by the most gracious comity of the most courteous of foreign countries.

OUR STATUTES:—Keeping these points clearly in view, let us turn again to the British statute, and observe that instead of finding there a declaration that naturalization should convert an alien into a British subject (a claim of effective change of nationality) we have merely a grant of certain privileges to the alien "in the United Kingdom"[10]—a grant of limited naturalization. The Canadian statute is (with the necessary change from "in the United Kingdom" to "within Canada") a copy of the British. They are both wrong. They should not be so limited. It is perfectly true that neither parliament can confer status beyond its own

[9] Cf. Int. Law Assn., 23rd Report, pp. 360-381.
[10] *Ante*, p. 840.

jurisdictional limits, but it is not true that they cannot confer status to which world-validity may be given by world-assent. If a British statute grants British nationality "in the United Kingdom," the grant is a limited one. If there be no limitation, it may be (and now very probably would be), considered by the world as effective in all jurisdictions. There must be a claim before there can be assent to the validity of the claim. But our statutes make no such claim, and a man whose British naturalization extends only to the United Kingdom cannot hope to be recognized as a British subject when in foreign countries. As was said in the Colonial Office circular of 1874 (above referred to:)—

"It is hardly to be expected that a foreign Court will consider a person a British subject, if the law itself (the British law) treats him as a subject only in the United Kingdom, and as an alien in the colonies."

The point came before the French Court of Cassation in 1890. A Frenchman had received naturalization in a British colony; French statute-law had enacted that foreign naturalization should terminate French citizenship; but the court held that naturalization to have such effect must be a complete and not a mere partial and local change of status.[11]

CONVENTION WITH THE UNITED STATES:—Another factor must now be introduced. The conference assumed that colonial naturalization was local; that it could have no effect outside the colony; and that therefore an American naturalized in Canada would retain his American nationality. The existence of the convention between the United Kingdom and the United States (1870), seems to have been overlooked. It provides that citizens of the United States who have been, or shall become naturalized according to law within the British dominions shall be held by the United States "to be in all respects British subjects and shall be treated as such by the United States."

This is an excellent example of the state to which the alien originally belonged, assenting to his expatriation by an act of naturalization in a foreign country. But the convention has, of course, no application to the case of an American citizen who takes merely local or temporary naturalization in a British dominion. It would be impossible to expect the United States to treat as "in all respects British sub-

[11] Westlake: Int. Law (Peace), p. 229.

jects," persons who in all parts but one of the British possessions are treated as Americans. As we have already seen, the naturalization conferred in the United Kingdom upon an American has no effect in Canada; and it would be in the last degree absurd if an American naturalized in England should be an American in Canada, but nevertheless a British subject in the United States. It would, of course, be equally absurd that an American naturalized in Canada should be an American in England and a British subject in New York.

With other countries, the United Kingdom has no convention, but several of them have general statutes similar to section six of the British statute:—

"Any British subject who has . . . when in a foreign state . . . voluntarily become naturalized in such state, shall from and after the time of his so having become naturalized in such foreign state be deemed, within the United Kingdom, to have ceased to be a British subject and shall be regarded as an alien."[12]

And it will thus be seen that the laws of most countries now reciprocally contain general assent to the expatriation of citizens as a consequence of their naturalization in other countries.

WHAT OUGHT TO BE DONE?—Under all these circumstances what ought to be done? If the resolutions of the conference are wrong, what ought to be substituted? As help to answers to these questions, two further points must be explained and understood.

First, we must distinguish carefully between status and rights. Do not imagine that because a man is a British subject that he, therefore, has a right to vote, or a right to live anywhere in British dominions, or a right to possess lands there, or a right to hold shares in a British ship. He has such rights, and such only, as the law of the place he is in allows him. Although a British subject he may have no right to vote, no right to hold land, or shares, and he may even be debarred from entering many parts of British territory. He remains bound by all local laws. Millions of natural-born British subjects are excluded by local laws from various parts of the King's dominions. Naturalized sub-

[12] The Canadian statute contains the same clause, with the substitution of "Canada" for the "United Kingdom." The United States statute is somewhat similar.

jects would, of course, be in no better position. Abandon the idea that British naturalization necessarily carries with it rights of any kind. It confers such rights as the law provides and none other.

Second, we must distinguish between rights which a British subject has when within the King's dominions and those which he has while abroad, the chief of which is protection or good offices.

We are now in a position to consider the answer to our questions. At the conference Sir Wilfrid proposed that each of the Associated Kingdoms should have authority to create British subjects. He objected to local naturalization, taking as his motto "A British subject anywhere, a British subject everywhere."[13] The British government objected. Its reasons were not fully stated, but when we remember that upon the British government falls the responsibility of affording protection to British subjects in foreign countries, we must concede the reasonableness of that government retaining control of additions to its responsibilities.

At the same time, it is absolutely essential that Canada should have authority to confer nationality upon the thousands who go to reside there, and it is still more important that the effect of naturalization in Canada should put an end to previous nationality. But that effect (as we have seen) will follow Canada's action *only if Canadian naturalization is complete.* Conferring privileges upon an American while he is "within Canada," leaves his American nationality elsewhere untouched. That will not do. It might bring us into very serious trouble in days to come. Our naturalized Canadians must owe no allegiance, under any circumstances, elsewhere.

What is the solution? Plainly this, that the United Kingdom shall acknowledge that Canada has the authority which she requires; but that, on the other hand, aliens naturalized in Canada shall not be entitled to British protection in foreign countries. Naturalized subjects are not at present, in all respects, upon a footing of equality with natural-born subjects, and prior to the statute of 1870, the differences between them were much more numerous and important than they are now. There is, therefore, nothing novel in making distinction between the two classes of subjects.

[13] Proceedings, p. 252.

The only changes which I suggest are:—

(1) The elimination from the Canadian naturalization statute of the local limitation of the effect of the certificate—principally, for the purpose of thereby bringing Canadian action within the operation of the foreign statutes and the convention with the United States, and thus effectually terminating foreign nationality concurrently with the grant of British.

(2) The recognition by the United Kingdom (a statute is not necessary) of the authority of Canada so to legislate.

OBJECTIONS:—Any suggestion that the United Kingdom could reasonably object to the exercise by Canada and the other Dominions of the power just referred to, is based upon misapprehension. It is true that the United Kingdom insists upon residence of five years before granting naturalization; that New Zealand (for example) imposes no residential condition; and that, therefore, aliens might be turned into British subjects without observance of the safeguard which the United Kingdom insists upon. But the answer is that the safeguard is necessary only in connection with the duty of protection in foreign countries, and that, if my suggestion be adopted, that duty will not exist.

The effect *within* the United Kingdom, of Canadian naturalization, would be no different from its effect elsewhere. If properly conferred (with the assent of the country of the former allegiance), the United Kingdom would recognize its validity (every other state would do so) and recognizing the status conferred by Canada would not give to the holder of her certificate a single right within the United Kingdom. The United Kingdom would, therefore, be in no way affected by colonial naturalization—the alien would, by it, get no rights in the British Isles, and he would not be entitled to protection elsewhere.

But is not the suggestion that colonies should be permitted to create British subjects, and that the United Kingdom should be asked to recognize such persons as British subjects, rather curious and anomalous? Possibly, but not more so than are other relations which at present exist between the different parts of what is called the "Empire." If we use language that is more in accordance with fact—if we speak not of "Empire" but of Associated Kingdoms, the

situation becomes more consonant with general ideas. For if all the Kingdoms were (as they are rapidly hastening to be) of equal national standing, naturalization by each, and recognition by the others of the validity of the action of each, would be the only possible and the perfectly natural arrangement.

Possibly a better answer to the suggestion of anomaly is that if my proposal would create anomaly, it would at least be a less startling and inconvenient anomaly than those proposed by the conference, namely (1) that the colonies should have authority to convert aliens into British subjects, and that the United Kingdom should *not* recognize the fact; and (2) that there should be two sorts of naturalization—one good everywhere, and the other good only in spots. Almost anything would be better than that.

If it be further objected to my proposal that the United Kingdom would not agree to the creation of British subjects from whom she would withhold protection, the sufficient answer is that that very peculiarity is one of the striking features of the present situation, and that the resolution of the conference proposes to continue it. In the report of the British Inter-departmental Committee of 1901 (after stating that colonial naturalization had given rise to various difficulties) there occurs the following passage:—

"These and similar questions, it will be observed, affect the rights and duties of locally naturalized persons. It is another and a different question how far such persons should be recognized as proper subjects for 'good offices' as between the British and foreign Governments. This is a matter not of law but of discretion."[15]

At present aliens naturalized in Canada are not entitled to British protection in foreign countries; but as a matter of practice—of discretion—the holder of a colonial certificate of naturalization is always given "a British passport ensuring to him the good offices of His Majesty's diplomatic and consular representative if he goes into a foreign country."[16]

My proposal, therefore, involves no change with reference to protection, in foreign countries, of aliens naturalized in Canada.

[15] Cd. 723, p. 12.
[16] Br. Interdep. Report, 1908, Cd. 5746-1, p. 228.

IN THE FUTURE:—Thus far I have written with strict regard to the nature of the political relations which now exist between the United Kingdom and the self-governing dominions. I now desire to call attention to the illustration which the whole discussion very forcibly affords of the futility of continuing to speak of those countries as forming parts of an empire. The difficulties that we have had to deal with arise simply and solely from the fact that, instead of an empire, we have to deal practically, although not nominally, with independent kingdoms. No one ever imagined that in an empire there could be anything but unity of citizenship—that there could be a variety of local laws providing for "local" citizenship. And it may be worth while to indicate the nature of the effect which would be produced by a declaration of Canadian independence—by the fact that the United Kingdom and Canada had become separate kingdoms subject to the same king.

In that case Britons would be British subjects, and Canadians would be Canadian subjects. Each in the country of the other would retain his own status, but at the same time would not be an alien. In other words, a Canadian in England would be a Canadian, but would not be (as an American would be) an alien.

If we were to be guided solely by Calvin's case,[17] we might be inclined to go further and say that the Canadian would rank in England as a natural-born subject there. Calvin was born in Scotland during the union of the crowns of England and Scotland, but prior to the parliamentary union of the countries (that is while they were separate kingdoms subject to the same king), and the English court held that he was, in England, a natural-born subject, and as such could hold lands there.

"Legiance," it was said, "is a quality of the mind and not confined within any one place."

Legiance was regarded as a personal relation between the king and the man, and a subject in one part of his realms must, therefore, be equally a subject in every part.

That was quite in accord with feudal conception, but the decision failed to supply answer to the further question which arose in the Stepney case,[18] namely, if Hanoverians, born during the union of the crowns of the United Kingdom

[17] Rul. Ca. Vol. 2, p. 575.
[18] 1886, 17 Q. B. D. p, 54.

and Hanover, were natural-born subjects in England, what were they after the dissolution of that union? Plainly they could not, after the separation, continue to be British, and if from that it necessarily followed that, during the union, they could not have been, in all respects natural-born subjects, all that could be said was (as per Lord Coleridge):—

"It has long been settled that while the crowns of two countries are held by the same person, the inhabitants of the two countries are not aliens in the two countries respectively."

After the declaration of Canadian independence, then, Britons and Canadians will be subjects of the same king; each will have a distinct and separate nationality; but neither of them will be aliens in the country of the other. We shall not be fellow-citizens, but we shall be fellow-subjects.

Ottawa. JOHN S. EWART.

WORKMEN'S COMPENSATION.*

While I have given much time to a study of employers' liability and workmen's compensation laws and systems in the United States, in England and in Continental European countries, I have not had the opportunity to investigate Canadian laws and conditions as thoroughly as I would like. For this reason I ask you before hand to make mental notes of facts, figures, and conclusions in my talk concerning the Dominion of Canada, which do not seem sound or correct to you.

The progressive business men of all countries have great duties to perform in these days of growing social and industrial discontent. The influence of political and sensational leaders is becoming greater all the world over. Demagogues, socialists and other disturbers are keeping all nations, and especially those depending largely upon industrial pursuits, in constant upheaval, and it requires an unwarped mind, a clear eye and a true patriotic spirit to find the straight and narrow path and to follow it consistently.

* Remarks of Mr. F. C. Schwedtman before the Annual Convention of the Canadian Manufacturers' Association at Toronto, October 11th, 1911. All rights reserved to F. C. Schwedtman.

It is especially difficult for the manufacturer and employer to know where progressiveness ends and radicalism begins. He is so busy building up his business, meeting competition and exploring new fields that he has no time to devote to economic studies, psychological observation or other scientific means of comparing cause and effect of past, present, and future abuse or conservation of the elements which enter into the products of our factories and stores. Appreciating the need of acting constructively and unitedly on all questions which concern the manufacturers of Canada, you have organized this wonderful association of yours, which has become a powerful factor in the industrial development of your great country.

Much as you have had to organize for mutual protection, the employers of the various nations were compelled to meet and act collectively, and some of the employers' associations of the world have long past the point of organized defence for which they were originally created, they have become strong national factors for collective constructive work of the greatest national importance. Now, I ask you: Is it not in line with past development of manufacturers' and employers' associations to conclude that much good might come from closer touch between the organizations of the various nations? There was a time when the individual manufacturer was afraid to meet his competitor. Organization has changed all this and competitors now know that they have for more to gain than to lose by meeting and comparing notes and exchanging experiences. Each nation, much the same as each individual manufacturer, has its own problems, and foolish is the person who would settle these problems by absorption or by paralyzing competition. Let us stand first, last and all the time for the glory and independence of each nation and for the integrity and reputation of our establishments. We cannot and will not Americanize, Anglicize or Germanize the world. We are proud of our national individualities and we each want to remain what we are, but we can and must profit by the experience of other nations and be guided by their experiences, successes or failures.

The subject of preventing accidents to wage workers and providing equitable compensation for unpreventable accidents is not a new one. It has engaged for the last thirty years the attention of legislative bodies of all civilized countries. Progressive employers have been the backbone and sinews

for improved conditions. Voluntary systems of prevention and relief have been inaugurated by numerous American employers which compare favourably with those of the best European conditions, but on the whole the United States and Canada are far behind other civilized nations in questions concerning injured workers' compensation, employers' liability and accident prevention. Employers are no more to blame for this than any other class of people, but the day has come when unless we employers take the initiative and settle these problems in a human, constructive and efficient manner, they will be settled for us by the demagogue and agitator. This, at least was the thought of the officers of the National Association of Manufacturers two years ago. Members of the National Association of Manufacturers located in every State and City of the Union have during many years manifested practical interest in the prevention and relief of industrial accidents. Some have established their own plants' private systems of relief and prevention which have attracted national attention.

Impressed with the continually increasing importance of this subject its appeals to justice and humanity and its relation to widely proposed changes in the nature of employers' liability laws, a special committee was appointed to investigate the whole question from the viewpoint of the progressive employers. I have had the honour to serve as chairman of this committee from its beginning.

Our first step was to make a thorough inquiry among 25,000 employers of the United States, with the result of 15,000 replies. 99% of these replies demonstrated that the employers are not satisfied with the workings of our old liability laws on the ground of their being unsatisfactory. wasteful, slow in operation and antagonistic to harmonious relations between employers and wage workers. Practically all employers addressed are in favour of equitable indemnity systems, providing automatic relief for victims of industrial accidents or their dependents and especially in favour of a systematic, strenuous accident prevention campaign. The greatest difficulty in the way of immediate results is the lack of experience on the part of almost every body of how to go about the general inauguration of prevention and compensation systems.

I am well aware that your various Canadian provinces, as well as many of our States in the Union, have collected some

statistics bearing upon accidents in such occupations, but these statistical data are not sufficiently broad, accurate and of long enough duration to serve as a basis for intelligent consideration—legislative or voluntary. You would not build a house or a machine without complete plans, and a nation cannot cover a subject of such importance as this without plans, records and fundamental principles upon which to build.

So-called reformers do not always appreciate this. A short time ago I addressed the Governor and Legislature of one of our middle western states. The Governor, a man of many fine qualities, asked me during the progress of our arguments: "Now, Mr. Schwedtman, why have you gathered all this mass of facts and figures from European sources? I do not care how England or France or Germany settle this problem—we can surely settle it better than they can." I asked him how he would settle it without statistical figures as basis. Said he, "Mr. Schwedtman we need no figures—all we need is the right kind of a gizzard" (which means the right heart). Of course, there is no sense in arguing with such a man. He misunderstands the issue.

American wage workers do not need and do not want charity. They want justice, and the employers of Canada and the United States are as anxious to be just, fair and progressive in dealing with their wage workers as they are in every other avenue of endeavour. Let me then in a general way outline for you the cardinal principles and conclusions which the organization which I have the honour to represent has adopted and the modes of procedure which it is pursuing. This I will follow up with facts and figures which serve as our basis for action and for a better general understanding. I shall illustrate my arguments by charts, diagrams and illustrations.

If, by magic, we could do away with all future work accidents we would have no need of dealing with any other phase of the problem. Every accident cannot be prevented but experts agree that one-third or even one-half of all work accidents and their accompanying ills can be eliminated by careful and systematic endeavour. Consequently, prevention of accidents is of prime importance, but for practical reasons I shall discuss several other phases of the subject ahead of prevention.

Suppose we get into the proper spirit for considering various cardinal principles and explanations adopted by the National Association of Manufacturers by reflecting upon the importance of the problem which we are trying to solve.

Authorities tell us that in comparison of the vital and physical assets of a nation, as measured by earning power, the former are from three to five times as valuable as the latter. These authorities assert that there is as great room for improvement is our vital resources as in our lands, waters, minerals and forests, and that this improvement is possible in respect both to the length of life and to freedom from disease and accidental injury during life.

Professor Irving Fisher estimates (In Bulletin No. 30 of the Committee of One Hundred on National Health) that $250,000,000,000 is a minimum estimate of the vital assets of the United States in 1907, and that of the estimated annual loss of three billion dollars, due to sickness, accident and death, one half or $1,500,000,000 is preventable.

The fire losses in the United States and Canada for the month of March as compiled by the Journal of Commerce (N.Y.) shew a startling increase over the customary sum chargeable in March, the total being $31,569,800 as against $18,465,550 for the same month in 1910, and $13,795,400 for March, 1909. The total loss by fire for the first three months of 1911 in the United States reaches to $69,907,250, a remarkable increase over 1910 when the total was only $49,130,300 and 1909, when it amounted to $52,661,400. During March this year there were no less than 354 fires where the loss in each instance reached or exceeded $10,000.

A special inquiry by the United States Geological Survey to determine the fire waste in the United States for 1907, included nearly five thousand cities, rural communities and villages. In comparison with European fire loss ours is from five to eight times greater. We are paying a preventable tax annually of 366 millions, enough to build one Panama Canal every year.

The buildings consumed in 1907, if placed on lots of 65 foot frontage, would line both sides of a street from Chicago to New York. A person journeying along this street of desolation would encounter at every thousand feet an injured person and at every three-quarters of a mile he would see the charred remains of a human being, and when burned out

at the end of the year, the fire would begin all over again on a street of even greater length.

A comparative summary extended over an average of five years shewing the number of men killed in mines, for each thousand employed in various countries is as follows: France, .91; Belgium, 1; Great Britain, 1.28; Prussia, 2.06; United States, 3.39. There has been a gradual increase in the mine casualties in this country, whereas in Europe there has been a steady decrease. One-half of the suffering and the human and the economic loss due to accidents is preventable.

I have some illustrations here drawn from American sources. You could find corresponding illustrations in the history of your country.

During the past ten years we have had two wars—the Spanish and the Philippine, and the aggregate loss of killed and wounded in the two was less than six thousand men, while the number killed and wounded in our industrial army during the same period, according to lowest estimates, was more than 5,000,000, that is, for every man killed or wounded in war "victories of peace" have cost us 875 men killed and wounded.

The six bloodiest battles of the Civil War were Gettysburg, Spottsylvania, Wilderness, Antietam, Chancellorsville and Chickamauga. The total number of killed, wounded and missing in these six battles aggregated less than 105,000 men, while the number killed and injured upon our railways during the year ending June 30th, 1906, was 108,324. (Tolman.)

Taking the last estimate of our industrial expense the total number of casualties suffered by our industrial army is sufficient to carry on perpetually two such wars at the same time as our Civil War ond the Russo-Japanese War. (Tolman.)

It would be misleading to leave this subject without comparing the fearful human losses due to work accidents with other causes of human loss.

Deaths caused by occupational accidents in Germany:

Diseases of digestive organs	12.5%
Tuberculosis (all kinds)	9.7%
Old age	9.2%
Paralysis	8. %
Blood circulation troubles	7.3%

Pneumonia	7.2%
Diseases of breathing organism	5.3%
Cancer	4.1%
Diseases of the bladder, etc.	1.6%
Whooping cough	1.4%
Diptheria	1.3%
Suicide	1.1%
Measles	.9%
Scarlet Fever	.8%
Accidents	.8%
All other causes	27.8%

It is quite evident from this that compared with deaths from other sources work accidents are not as serious as might appear at first glance. I might go on producing additional facts and figures without limit, but these answer the question sufficiently. You will notice that many of my statements are made with particular reference to popular understanding in the United States. The facts and figures could easily be translated into Canadian comparisons for a popular education campaign in your great country. This I have not had the time to do.

To solve this problem, the same as any other great problem, we need to consider two programmes, one for the immediate future, which must necessarily be based more or less upon policy and upon the temporary hardships which stringent legislation in some of the provinces or States may place upon us. I have considered this question in a recent pamphlet entitled "What Can Employers Do?" and while this pamphlet is particularly drafted for the employers of the United States, I believe it holds good in many points with equal force for the employers of Canada. Time is too short to endeavour to analyze the temporary programme thoroughly, and for this reason I have brought along a number of these pamphlets which may be had from your offices.

The more important question is the permanent programme. It may take years of educational work among all classes of society to establish your permanent programme in all parts of the country and in all callings. The permanent programme must cover two phases, one covering legislative action, the other voluntary action. I shall endeavour to picture in your minds the basis for such a future permanent programme as the progressive employers of other countries and especially those of the United States

have considered proper. A permanent programme requires definite cardinal principles, and I shall discuss the work of the future under cardinal principles adopted by the National Association of Manufacturers last May at this organization's last annual meeting. In considering the temporary as well as the permanent programme we must bear in mind that "the greatest nation of the future will be the nation that best understands best how to economize and preserve human energy and happiness at home and how to build up trade abroad."

The first cardinal principle adopted by the National Association of Manufacturers is:

"All legislation must be for compensation" and the explanation is added that "every kind of employers' liability legislation has proven a failure in every civilized nation." And here let me explain that the Act which is now in force in England and which has been adopted with modifications in some of your provinces is what I call an "employers' liability Act" although it is entitled a "workmen's compensation Act." The difference is that in an employers' liability Act the obligation to compensate is thrown directly upon the individual employer, while in a workmen's compensation system the compensation is taken care of by some form of insurance. Of course under the English Act there is also insurance; but it is not compensation insurance, it is merely an insurance of the employers' liability and is only for the purpose of protecting the employer and not for the purpose of assuring compensation to the workman.

Injured Workers' Relief in Europe.

Workmen's Compensation System:—Austria, Belgium, Denmark, England, Finland, France, Germany, Holland, Hungary, Italy, Luxemburg, Norway, Spain, Sweden.

Employers' Liability System:—Switzerland.

This requires considerable explanation. Please note that Switzerland is apparently the only European country which has so far retained the old employers' liability system, which is still in use in most of the States of the Union, and in the provinces of Canada. This system gives the injured employee only the right of suing the employer and results, according to statements of experts, in such a shewing as pictured here.

The very best employers' liability system is very inefficient and bad.

Insurance and litigation expenses consume $70 to $80 out of every $100 paid for liability insurance.

Injured workers or dependents receive $20 to $30.

On the other hand Germany's compensation system seems to be the most efficient in public use and brings general results such as shewn below.

Compensation Insurance Systems Have Been Found Most Efficient and Best Everywhere.

$80 goes to injured workers or dependents out of every $100 paid for compensation insurance in Germany.

$12 out of $100 pays litigation and insurance.

I shall later prove the details of German expenditures after a few more general words about systems of the various nations. To the student of the movement as shewn in European history of thirty-five years, it is evident that none of the workmen's compensation systems in operation in any countries have assumed their final form. This is particularly true of the English system. Mr. Lloyd-George's National Insurance Bill which is now before the British Parliament, is suggestive of an intended nucleus for a general system of insurance which will ultimately displace the present English system of compensation. The present so-called English method of dealing with the accident problem by extending the liability as between the individual employer and the individual workman, so as to make the former liable for injuries to the latter, regardless of the fault of employer or worker, is wrong in principle and pernicious in its operation. From personal interviews I know that a large degree of dissatisfaction exists in England with the operation of present accident compensation laws. The following three paragraphs tell their own story.

Nor is this impression of German efficiency confined to Germans, England has sent a dozen or more commissions into Germany in the last year to study industrial conditions, All of them speak highly in their reports about German industrial efficiency. I quote a small part of the report of one of the most critical English Commissions, which consisted of members of the Labor Party and Trade Union Commission:

"One effect of all these public and voluntary organizations is to prevent the hideous open social sores with which we in Great Britain are so familiar in the streets of our large cities. There are certainly poor in Germany, many more than in England, but there are few so utterly broken

on the wheel of misfortune as those who are allowed with us to wander about, parading their sores and propagating their kind.

"To sum up this first point, it seems to us that Germany, individually and collectively, is realizing itself and organizing itself. True, it is largely of bureaucratic methods. What effect this may have ultimately, or may have had already, on individual character as well as on home life, we are not in a position to say, but we are convinced that it is having a considerable effect at present in increasing the productive efficiency of the nation. In short, it is brains and not tariffs that account for Germany's wonderful progress in the world."

Even in France where, ordinarily, anything German finds little consideration, the German Social Insurance System is admired.

Edward Fuster, of Paris, one of the greatest social insurance experts of the world, said recently:—"The money which Germany is devoting to social insurance reappears in a thousand forms. It promotes happiness of the family, health and self-respect. It makes for a strong, enduring nation and for international supremacy."

I have no desire to convey the idea that Germans have reached the point of perfection in matters of accident prevention and compensation. German methods are in line with the conclusions and recommendations of the best international, including English, experts, as expressed at such conferences as that at the Hague which I attended a year ago. There seems to be full harmony among the best representatives of the various nations assembled there, and the large majority of them agree that it is far more reasonable and desirable to relieve both employer and wage-worker from personal liability for unpreventable work injury, but to provide automatic, efficient compensation by insurance. Germany having a more centralized government and having made an earlier beginning, seems to keep ahead of other nations in this particular direction.

Workers' Accident Relief Increases National Efficiency.

Dr. Paul Kaufmann, President Imperial Insurance Department, tells us:—"The workers' lives preserved means maintenance and increase of our national resources and therefore give splendid returns for the heavy financial burdens which social insurance places upon our economic struc-

ture. It is not an accident that the unprecedented expansion of German commerce and industry and the wonderful improvement in the economic welfare of the nation during the last twenty years have happened concurrently with thorough-going improvement in the condition of our workers. There is a close connection between the two events."

Dr. Spiecker, President Siemans & Halske Co., Berlin, and Chairman, League of Employers' Associations, writes:—"To-day everybody who views the situation without prejudice must acknowledge that the task of the Employers' Association in this field (prevention and compensation) is a great blessing, not only to the workers but to the industries and the nation. It is perfectly evident to-day that we have secured higher efficiency in our industries, due to increased workers' efficiency, all brought about by relieving our workers from worries and distress on account of sickness, injury, superannuation and invalidity."

In view of this European situation every effort should be made to promote American legislation in line with best European theory and practice and not along the lines of the workmen's compensation Acts of the different provinces of Canada and some of the States of the Union, which are in reality employers' liability Acts. The final working out of a good system will be a matter for continued and carefully directed effort for a considerable period of years and not for occasional and haphazard legislative enactment.

The second principle and explanation adopted by the National Association of Manufacturers reads:—

"Compensation legislation must cover every wage worker. The man, who, without his own fault, loses his hand in a farm machine is as much entitled to compensation as the engineer who loses his hand in an engine gear.

Total Occupational Accidents Analyzed for the Year 1908, Germany:—

Farming	43½%	Steel industry ..	10½%
Mining	8¼%	Building	7½%
Railways	4 %	Warehouses	2 %
Wood industry ..	3½%	Textile	2 %
Quarries	2 %	Teaming	1½%
Excavation	1¾%	All others	13½%

That this statement is sound from a standpoint of justice and equity needs no argument, but that it is not good pol-

icy from the standpoint of politics is equally evident by the fact that in nearly every case where laws have been enacted in the provinces of Canada or the States of the Union the farmers have been exempted.

Temporary Disability Due to Occupational Accidents for the Year 1908 in Germany:—

Farming	45 %	Warehouses	3 %
Steel industry ..	9 %	Railways	3 %
Building	9 %	Teaming	2½%
Mining	8½%	Quarries	2 %
Wood industry ..	4 %	Excavations	1¾%
All others 12¼%			

Several commissions in the United States have recommended that farmers be covered, and I understand that the Commission appointed by the Province of Manitoba also recommend that farmers as well as manufacturers should be liable for compensation. However, in the form in which the Compensation Act finally passed, farmers were exempted, proving that legislators in Canada as well as in the United States are more swayed by political expediency than justice.

Frequency of accidents in various occupations:

Teaming	22.0	per 1,000	employed.
Quarry industry	15.7	"	"
Mining	14.6	"	"
Building trades	11.4	"	"
Average for all industries	9.5	"	"
Farming	11.1	"	"
Chemical Mfg.	9.2	"	"
Electrical Mfg.	6.3	"	"
Glass industry	4.9	"	"
Printing	2.8	"	"
Tobacco industry	.6	"	"

German statistics prove that farming is more hazardous than the average of all the industries, and American facts and figures indicate that the risk of farming is equal to that of carpenters and greater than the risk of machinists.

After studying these statements based upon the very latest statistics it would seem of little use to construct laws or adopt systems which do not cover the farmer. He stands first on each chart and this holds good not only in total

numbers but also in percentages. The Canadian politican will no doubt tell you, as do our politicans, that there is no good reason for our concern about the injured farmers and that it is better to correct some wrongs than none of them. There are two very good reasons why manufacturers should insist upon having the farmer covered. The first reason is this: any law which covers the farmer will never be enacted or enforced in a radical manner, while one covering the manufacturer alone is liable to be used as a political football. It may be made the basis for campaign pledges to and by labour union leaders and demagogues and it will never stay settled long. The second reason in this: 98% of the manufacturers, the same as any other law-abiding class of society, are patriotic, progressive men. They are not only willing but anxious to do their full share in paying taxes and developing and conserving the resources of the country. But they want to see everybody else carry a full share. The health and well-being of the people, the self-respect and earning capacity, the lives and limbs of our toilers, are our best resources, and we will find manufacturers always in the front rank of those who aid in this important work.

(14,945 accidents including 632 deaths among farm workers are caused by falls from ladders, haylofts, etc., in one year.)

(Dangerous animals must be guarded. 19,143 injuries including 1,180 deaths among farm workers.)

Incidently let me explain to you the liberal use of red colour in many of my illustrations. Red means danger all the world over. Several European nations have adopted red colour as indicating danger to life and limb of workers.

Red paint is applied to dangerous parts of machinery, as well as to dangerous places in factories and to accident prevention devices generally. It is asserted that a gallon of red paint judiciously applied outweighs in point of practical efficiency all other prevention devices in the world, and such a claim looks reasonable.

(Safety appliances for farm wagons. Agricultural teaming is responsible for 10,486 accidents in one year.)

(Scythe blades must be covered when not in use. Farmers' hand tools are responsible for 4,482 accidents in one year.)

(5,718 accidents among farm workers are caused by cutting, handling and hauling timber in one year.)

(1,777 accidents including 17 deaths caused by feed cutting machines in one year.

(Threshing machines responsible for 1,296 accidents, 44 deaths.)

After exhibiting some of these charts I have been told time and time again that, whatever German statistics may prove about farm accidents, it is not likely that such conditions exist in Canada or the United States. I have looked around for information and find abundant evidence for believing that relatively farm hazards are even more pronounced in America than in European countries.

(U. S. A. Accident Insurance Rates:—

Textile operatives, rated ordinary or medium, $7.50; $10.00 per annum.

Machinists, rated medium or special, $10.00; $12.50 per annum.

Carpenters, rated special or hazardous, $12.50; $15.00 per annum.

Farmers, rated special or hazardous, $12.50; $15.00 per annum.)

Farmers are classed as "special" or "hazardous" and in addition to paying a higher accident insurance rate than many of the occupations commonly known as "dangerous," are limited to a lower maximum insurance sum.

(10 years' Experience of a Large American Casualty Co.

Mill operatives, cotton and wool, premium average about $8.00 per annum.

Machinists, premium average about $10.50 per annum.

Carpenters, shop, premium averages about $11.00 per annum.

Farmers, premium averages about $13.50 per annum).

The American insurance rates shewn in these charts were taken from the actual records of one of the largest casualty insurance companies in the United States.

(Non-fatal accidents among Canadian Miners and Farmers. Statistics of Canadian Department of Labour:—

	1904	1909	
Miners.....	10%	5%	of total number
Farmers	7%	13%	" "

Mine non-fatal accidents have decreased 50%.

Farm non-fatal accidents have increased 87%.

Canadian statistics also shew farm accidents larger than those of any other calling, and what is worse and more sur-

prising, farm accidents are increasing faster than even mine accidents.

Total fatal accidents for six years:—

	1904	1905	1906	1907	1908	1909
Farm	11%	13%	16%	15%	18%	20%
Mine	11%	7%	10%	13%	11%	12%

Six years' increase in ratio of mine fatalities, 9%.

Six years' increase in ratio of farm fatalities, 82%.

And this holds good of fatal as well as non-fatal accidents.

Cause and frequency of accidents analyzed according to occupations 1908, number of injured workers per 100,000 insured for one year of 300 working days:—

Engines and motors	181.04
Falls from ladders	143.26
Giving away of supports	136.46
Loading and unloading	133.18
Tools	66.48
Railways	62.79
Teaming	61.19
Miscellaneous	42 46
Elevator and lift engine	39.19
Inflammable substance	32.74
Animals	13.41
Navigation	7.41
Explosives	6.50
Steam boilers	2.31

A study of hazardous occupations would be incomplete without an analysis of all occupations with a view of determining which particular kind of activities are responsible for most accidents. This chart analyzes the industries.

Cause and frequency of accidents analyzed according to occupations 1908, number of injured persons per 10,000 insured:

Falls from ladders	98.76
Teaming	64 17
Animals	53.28
Loading and unloading	32.46
Tools	27.61
Engines and motors	27.46
Giving away of supports	24.31
Miscellaneous	22.49
Inflammable substances	4.65

Explosives	1.20
Railways	.68
Elevators and lift engines	.38
Navigation	.18
Steam boilers	.12

And this chart analyzes agricultural occupations. Note that falls from ladders are responsible for far more accidents than any other cause on the farm, while in the industries falls from ladders are second only to machinery.

I cannot close my argument for equal justice to all injured workers better than by quoting the words of my good friend, Walter Drew, of New York:

"And why should not agriculture be the most dangerous of all employments? A farm worker drives teams, uses explosives, handles machinery of all sorts, both in and out of doors, acts as carpenter, wood-cutter, painter, and as a general 'Jack of all trades.' There is scarcely a risk applicable to any dangerous trade that does not fall to him at one time or another, and added to all this, and especially so far as the use of tools and machinery is concerned, he is not specially skilled or trained, and has to work in company with other men who are likewise more or less unskilled.

"Consumption of agricultural products in this country has increased 60% in the last ten years, and production has increased by 20%. One of the most important of our present problems is to encourage labour to seek the farm. Is there any reason in justice why liability acts or compensation measures should not protect the farm worker, and is there not every reason, from the standpoint of national industrial well-being, why the farm worker should be equally protected with other workers, and every possible objection to form work removed?"

And now we arrive at the third principle and explanation adopted officially by the National Association of Manufacturers, which reads: "Compensation should be assured. (It must be as certain as government bonds. This can be accomplished through insurance, approved and preferably guaranteed by the government. However, every safe method of insurance should be permitted. State, mutual and stock insurance, as well as relief systems covering individual shops should be encouraged and none of these must be barred)."

The intent of this important provision is to benefit alike employers and wage workers and in addition to hasten the

ultimate distribution of the cost of unpreventable accidents over all consumers.

Insurance rates in New York before and after enactment of law of 1910. Per $100.00 pay roll:—
Chemical Schedule—

Acid Manufacturers	Before	$ 81
Increase 38%	After	1 12
Aerated Water	Before	1 62
Increase 102%	After	2 25
Building Trades, carpenters	Before	3 47
Increase 102%	After	5 00
Masons	Before	2 75
Increase 127%	After	6 25
Painters	Before	1 75
Increase 186%	After	5 00
Pipe fitters	Before	1 35
Increase 362%	After	6 25

In reviewing the able report of your committee at the 1910 convention, I find some paragraphs which are in exact accord with our views on this subject—your committee says: —"If the matter could be compromised by relieving from all further claims for compensation those employers who insure their payroll up to the extent of a year and a half wages, it would seem as though a solution of the difficulty could be satisfactory to both sides, for in that event the cost of insurance could be accurately ascertained by the employer beforehand and provision made for the same.

Comparison of compensation insurance rates in the State of New York and Germany, Per $100.00 pay roll:

Carpenter	German rate	$2 57
	N. Y. rate	5 00
Masons	German rate	1 43
	N. Y. rate	6 25
Painters	German rate	1 12
	N. Y. rate	5 00
Plumbers	German rate	1 50
	N. Y. rate	3 25
Steam and pipe fitters	German rate	1 50
	N. Y. rate	6 25
Coal miners	German rate	1 00 to 4 10
	N. Y. rate	7 20

And again your committee strikes a key-note when it further says:—"This view has found favour during the past year in Nova Scotia, where a somewhat stringent compensation law was enacted, carrying, however, a clause exempting from its operation certain companies like the Dominion Coal Company who contributed liberally to a benefit fund administered by a committee of their own employees." It is contrary to common sense and justice to either depend upon the continued solvency of the employer in whose service an injury was sustained or to burden an employer with a responsibility for uncertain losses not due to his fault, without giving him the chance to relieve himself from it by insurance.

Insurance rates in Ohio before and after enactment of law of 1910. Per $100.00 pay rolls:

File workers	Before	$ 22
Increase 100%	After	44
Lumber yards	Before	60
Increase 83%	After	1 10
Provision merchants	Before	60
Increase 128%	After	1 37
Box manufacturers	Before	70
Increase 150%	After	1 75
Plasterers	Before	1 00
Increase 30%	After	1 30
Carpenters	Before	1 75
Increase 35%	After	2 37
Mason contractors	Before	2 50
Increase	After	3 15
Concrete Construc.	Before	2 50
Increase 110%	After	5 25
Structural iron work	Before	5 25
Increase 48%	After	7 80
House wrecking	Before	5 00
Increase 100%	After	10 00

According to numerous interviews with progressive English employers, the worst feature of the British Compensation Act is its inflexibility in this direction. Instead of encouraging relief organizations in individual shops, English employers have had to abandon many such organizations which did good work formerly. Neither relief systems nor insurance exempts the British employer from final responsibility for compensation, and the uncertainty as to financial

loss is especially hard to bear by the small employer, with whose banking and financial standing it seriously interferes.

The problem of the small employer—German Statistics, 1908. 66 Industrial Employers' Associations cover 696,824 employers with 7,868,531 workers. Average number of workers per employer 11.

46 Agricultural Employers' Associations, cover 5,424,000 employers with some 17,000,000 workers. Average number of workers per employer 3.

On the other hand it is wrong to have injured workers or their dependents assume the uncertainty and the chances of loss due to the possibility of the small employer becoming insolvent. Another serious fault pointed out to us by employers in Great Britain, is lump sum payments instead of weekly or monthy pensions.

Lump Sum Payments versus Weekly Pensions.

European experts are unanimous in saying that to place into the hands of injured workers or their dependents, accustomed only to the handling of weekly wages, large sums, usually does more harm than good. It is the right of the public to demand, and it is the duty of injured workers or their dependents to guarantee, no further dependence upon public charity in return for equitable compensation.

It is generally conceded in England that difficulties due to lump sum payments would be much greater were it not for the most excellent administration of the law by English Judges into whose hands is given great authority for holding lump sum compensations in trust for pensioners. To these Judges belong great praise and admiration for the impartial, common-sense manner in which they manage compensation payments.

Total compensation insurance expenditure analyzed. German statistics for 1908:—

Compensations paid	$39,471,250—77.7%
Administration	6,524,250—12.8%
Reserve fund	4.810,000— 9.5%

Out of every $100 paid for insurance in Germany $77.70 goes to the injured workers or dependents, $9.50 to reserve fund, and $12.80 for administration.

The fourth principle and explanation of our organization says:—

"Compensation must be efficient. (Not less than 75 cents and preferably 90 cents out of every dollar paid into

the insurance fund should go to injured workers or their dependents. To this end administration, solicitation and legal expenses must be reduced to a minimum, and arbitration Courts, or simplified Court procedure, are required for settlement of disputes.)"

The efficiency of the so-called German system shewn is acknowledged to be higher than that of any other nation. Remember that according to statements of a number of persons who have given this subject careful study, only 25 to 40 cents out of every dollar expended in Canada and the United States for liability insurance are paid to injured workers. In Germany a little more than 77 cents is paid in this direction.

Cost of German compensation analyzed:—

Management	7.3%
Arbitration of disputes	1.2%
Miscellaneous expenses	.7%
Investigation and fixing comp.	2.6%
Inspection of safety devices	1. %

In this chart I have analyzed the expenditure of the 12.8 cents of expenditure which do not go to injured workers.

While we are primarily interested in accident compensation insurance, it is illuminative and proper to say a few words about the extent, efficiency and desirability of sickness and invalidity insurance.

Efficiency of German social insurance. Total insurance income (sickness, accident and invalidity) for 25 years—$2,663,000,000 distributed:—

Workers' compensation	$1,918,000,000	72 %
Reserve fund	552,000,000	20¾%
Administration	193,000,000	7¼%

The high efficiency and the success of German accident, sickness and invalidity insurance is principally due to the fact that it rests in the hands of employers' associations.

25 years expenditures for social relief in Germany.

$1,925,000,000 paid to 94,000,000 sick, injured and invalidated workers and their dependents.

Daily expenditures for social relief—$540,000.

Twenty-five years ago Germany abolished our present system of employers' liability laws. The government, in-

stead of using its autocratic power arbitrarily in opposing employers, conceived the idea of making employers' associations the very instruments for carrying out a novel scheme of compensation on scientific and efficient lines. As a result, the whole scheme of accident, sickness and invalidity insurance rests upon the shoulders of employers' associations, such as yours, as follows.

All accident insurance in Germany is of the mutual kind.

Summary of German facts and figures for 1808-1909:—

9,687 workers were killed.

1,072 workers permanently and completely disabled.

56,806 workers were permanently maimed.

73,584 workers were temporarily disabled.

142,965 injuries extended over 13 weeks.

662,321 is the total number of injured workers.

1,008,677 workers received pensions to the amount of $39,500,000 for occupational injuries.

One pensioner in every 63 inhabitants.

Accident insurance institutions are employers organized according to trades or crafts for the purpose of carrying, mutually and collectively, their workers' accident compensation risk. Every employer must belong to the organization of his craft, and to these employer's associations is given the legal power to enforce accident prevention and insurance rules, not only upon the employer, but also upon the worker.

German System Makes for an Efficient Nation.

German employers without an exception claim that compensation insurance pays from a business standpoint, as well as from a humane standpoint; that it makes for an efficient nation.

The high efficiency of the German scheme is due, as I see it, first: employers' associations carry their risk on a mutual basis and need make no profits for stockholders, nor do they pay commissions of any kind to solicitors. Second: they are headed by employers of high standing and much experience, who devote their time and intelligence to the good cause without pay. Third: prevention is encouraged. Insurance rates are based by expert adjusters upon the hazard of each individual shop, making due allowance for the money and energy devoted to accident prevention appliances, much on the lines of our mutual fire insurance companies. Fourth: legal expenses are very low due to efficient Arbitration Courts—1.2% of insurance cost.

Dr. Kaufmann, President Imperial Insurance Department, says: "Recognizing that it is of prime importance to prevent injury, State officials and employers' associations have concentrated their combined energies upon prevention, and wonderful have been the results. Scientific accident prevention is now recognized as a special and important branch of technical engineering. Invention and prevention have gone hand in hand in this work as advance agents of civilization. The workers' lives preserved means maintenance and increase of our national resources, and gives plentiful returns for the heavy financial burdens which social insurance places upon our economic structure."

Disputed compensation claims in Germany. Total cost of litigation, $1.20 out of every $100 paid to injured workers or dependents.

422,076 claims decided by employers' associations:

104,298 appeals by employees to Arbitration Courts	24.7 %
83,781 appeals decided in favour of employers by Arbitration Courts	19.85%
20,517 appeals decided in favour of employees by Arbitration Courts	4.85%
19,634 second appeals to Senate (Court of Last Resort) by employees	4.64%
5,600 second appeals to Senate (Court of Last Resort) by employers	1.32%
14,701 confirmations of Arbitration Court by Senate	3.48%
5,066 decisions of Arbitration Court changed by Senate	1.2 %
Total changes by Arbitration Court and Senate from employers' assn. verdicts	4.5 %

That both employers and workers are fairly well satisfied with compensation awards of German Arbitration Courts is evident from this by employers' chart. Note that only 4½% of the total awards made in the first place by employers' associations were changed in two appeals. I have attended two Arbitration Court sittings as the guest of the presiding Judge who, with his associate commissioners of two employers and two wage workers, tried 20 cases in two and one-half hours. There was a serious, common-sense endeavour to get at the facts which made a much more favourable

impression upon me than the numerous personal damage suits which I have seen tried in United States Courts.

Arbitration Courts or Simplified Court Procedure for Compensation Disputes.

Countries with simplified court procedure for settlement of disputes: Austria, Belgium, England, France, Germany, Holland, Hungary, Italy, Denmark, Norway.

Countries with regular Court procedure: Spain, Sweden, Finland.

An experienced doctor was present to assist the Court in all matters requiring medical knowledge. In most cases a medical examination was made in the court room.

The fifth principle adopted by the National Association of Manufacturers reads, with its explanation, as follows:—

Responsibility for agricultural accidents:

Employers' fault	18⅔%
Workers' fault	25 %
Employers' and workers' fault	23⅓%
Hazard of occupation	33 %

"Employers and employees are jointly responsible for all unpreventable accidents and should, therefore, jointly contribute the compensation expenditures. (Employers should cover approximately that part which is due to their fault and to the inherent hazard of the industry; employees should cover approximately that part due to their fault."

Responsibility for industrial accidents:—

Employers' fault	17⅓%
Workers' fault	29¾%
Employers' and worker's fault	10 %
Hazard of industry	43 %

These charts are complied from German statistics.

Workers' Contribution.—The principle of compensating the workers for accidents due to the hazard of the industry or to the employer's fault is sound, but the principle of paying the injured worker for accidents due to his own fault is neither sound nor reasonable. Without his co-operation and contribution we cannot hope to progress as rapidly in many directions, and especially in the direction of prevention, as we should.

I see from the report of your committee in 1910 that you are favourably inclined with workers' contribution to a com-

pensation fund established by insurance. Your committee recommends that half of the contributions be paid by employees. This is a far larger share than is customary in Europe.

Mutual Contributory Principle in Germany:—

Employers' contribution	83%
Workers' contribution	17%

This shews the 17% contribution which German workers make to the accident fund. This is made indirectly and through the sickness insurance scheme, out of which is paid all accident relief for the first 13 weeks.

Mutual Contributory Principle (in Switzerland):—

Employers pay 80% of premiums.

Workers pay 16% of premiums.

State pays 4% of premiums.

The Swiss scheme of contribution above is contemplated by the experts who are at present drafting the new proposed compensation law, with a view of incorporating in it the best experience of the various European nations and eliminating everything that has been found to work unsatisfactorily. Note that workers contribute 16% under the Swiss bill as compared with 17% under the German law. The government contributes about equally in both countries.

The contributory principle in German Social Insurance. Total sum contributed in 25 years for all social insurance (sickness, accidents and invalidity), $2,663,000,000:

Employers contributed ...	45 %	—$1,198,000,000
Workers contributed	40 %	—$1,064,000,000
State	5½%	—$ 147,000,000
Interest and Miscellaneous	9½%	—$ 254,000,000

Sickness and invalidity insurance by co-operation between employers and wage workers is a subject deserving much attention. Many American, as well as European, employers have established, voluntarily, model institutions for sickness and invalidity insurance, as well as for accident relief, and from personal interviews I know that in nearly all cases such institutions have proven successful, not only from a humanitarian, but also from a business standpoint.

Let me remind you that a former chart shewed the total sum paid into all the insurance funds in twenty-five years by the German wage workers as $1,064,000,000; they received out of all insurance funds the sum of $1,916,000,000,

or $180 for every $100 put in; surely a good investment for the thrifty German workmen.

Contributory Principle in Europe.

Employers pay the whole compensation in Belgium, England, Finland, Holland, Hungary, Italy, Spain.

Workmen or State contribute in Austria, Denmark, France, Germany, Luxemburg, Norway, Sweden.

The extent to which the contributory principle is carried in European countries is shewn above. The argument is often made that even if employers pay the whole compensation, workers contribute through their physicial suffering while injured and on account of the rate of compensation, which is lower than the regular wages while at work. Several national systems have been based upon this theory but they have not planned out as well as those which provide for workers' co-operation, financial and moral, and give him the full equivalent for earning power lost by work injuries.

Co-operation.—An important feature of joint contribution is the fact that it opens the way for meetings between workers and employers. It establishes a connecting link which, according to the experience of European as well as American manufacturers, is of invaluable service in fostering harmonious relations between employers and workers. Workers' as well as Government contribution is provided for in the new Swiss bill.

European experts figure that in systems where medical expenses are provided (as they should be under any sound national system) the full equivalent for total incapacity amounts to 66% of the regular daily wage rate on the theory that the ordinary lay-offs, expenditures for tools, working clothes, carfare, etc., while working consume one-third of the annual wage rate. In concluding my arguments on this phase of the problem I want to express my entire approval of the sentiment contained in the following excerpt from the report of the Secretary of your Legal Department, Mr. F. W. Wegenast; he says: "Another practical element to be considered is the possibility of developing a greater degree of co-operation and mutual sympathy between employer and employee. A distinct defect in the English system is the want of anything to develop such co-operation in the matter of prevention of accidents or ameliorating their effects. The effect of the English Act has been to discourage the formation of workmen's benefit

societies and actually to decrease their number, while the activities of labour organizations in other directions have greatly increased. Activities which might be directed into more useful channels are thus wasted in aggrandizing strife, tending to still further alienate the sympathies of employer and employee."

The sixth principle laid down by our association is this: "Every injury except those due to intention, criminal carelessness or drunkenness on the part of worker should be compensated."

Common sense tells us that we can secure efficient administration in no other way, and European experience bears this out. The inefficiency of present employers' liability schemes and the dissatisfaction created by their administration is largely due to squabbles as to the extent of the responsibility of the various parties involved in nearly every work accident. Contributory negligence, assumption of risk and fellow-servant doctrines complicate the issues, increase legal expenses, take, I am told, more than half of the time and attention of our Courts, delay settlements, reduce the percentage which finally goes to the injured workers, aids no one but ambulance-chasing lawyers, and above all creates a spirit of antagonism between employers and workers which seriously impairs national progress and efficiency.

Harmonious Relations.—The shortcomings of our present laws in antagonizing harmonious relations between employers and workers are too well known to need lengthy explanation. Every employer of experience is aware that in nine cases out of ten any kind of settlement with an injured workman under our present laws is unsatisfactory. It is more or less a gamble.

Bad Influence of Damage Suits.—The relation of employer and employee are transformed into personal dislike or even hatred during damage suits and this feeling leaves a lastingly bad influence, sometimes through a whole establishment.

We will have work accidents as long as we have civilization, and surely it is better for all parties responsible for or interested in these accidents to concentrate their combined energies upon prevention of accidents, upon prompt relief of unpreventable accidents and upon prosecution of criminal carelessness, intent or drunkenness responsible for accidents.

And now we come to the most important principle and explanation, namely, "Humanity and efficiency demand that prevention of accidents is made of prime importance. (Therefore, an efficient official inspection and statistical system, which increases or decreases insurance rates in proportion to the accident prevention activities of each individual establishment, is essential.)"

The desirability from a human as well as from an economic standpoint of preventing accidents is plain, but as practical business men, we want to know as the very first thing: Can accidents be prevented, and to what extent? Twenty-five years records of German statistics tell their own story.

Now please understand me correctly. These records do not prove a decrease in total number of accidents, but they do prove a decrease in human and economic loss caused by accidents. You might with equally satisfactory results compare total number of accidents for two years, and pieces of money in two pockets It is not the total number of pieces of money that counts for anything, it is the value of each piece.

Duration and cost of industrial injuries:—

21½% (142,965) accidents are of more than 13 weeks duration.

78½% (519,356) accidents are of less than 13 weeks duration.

Serious injuries cost 75% of total expenditures.

Light injuries, cost 25%.

This illustrates in a measure the meaning of my comparison. If the average cost of a serious accident was $1,500, then the average cost of a light accident is approximately $16, proving the necessity of looking primarily after the decrease of serious accidents. These figures also shew the fallacy of an argument which I have heard at various times to the effect that accident prevention has proven a failure, on account of the increased number of total accidents. Various reasons are given for the rapid increase of light accidents, the most important one being simulation.

Simulation.—A Swiss medical specialist, in discussing simulation, says: "To me it is a final conclusion, that in cases of accident the efficiency of the medical attendant is in direct proportion to his special training for such work. Simulation, which usually begins very soon after an acci-

dent, is much strengthened by uncertain action and lack of understanding on the part of the attending physician. No argument, threat, or fear of penalty will succeed in eliminating simulation or imagination later on, if proper attitude of the attending physician immediately following the accident has allowed them to take root.

In addition to imaginary ailments it is reasonable to believe that the strict enforcement of laws providing for reporting of every accident has much to do with greater number of reported accidents, which may not necessarily mean a corresponding increase in real accidents. However, the complications encountered in an accident-prevention campaign, mean close attention to good factory inspection, correct statistics and prompt and proper medical attention.

U. S. A. as Compared with German Inspection.—By Frederick K. Hoffman, Statistical Expert: "I do not hesitate to say, without fear of contradiction, that a single report of a technical supervising official in any branch of the German industry contains more matter of real determining and vital importance than all the reports which have ever been made under our inadequate system of factory inspection."

A scientific and practical inspection system is an important part of the German accident prevention and insurance scheme. Our own country is sadly in need of improvement, as is evident from the statement of Mr. Frederick K. Hoffman, one of the best statistical experts in the United States. The system and not the individual must be attacked and changed. Our State factory inspectors should be chosen according to fitness and training and kept in office, independent of politics.

A scientific and practical inspection system is an important part of the German accident-prevention and insurance system. There are two kinds of inspectors — Government inspectors and employers' association inspectors. An important duty of both classes of inspectors is to study working conditions, determine hazards and make preventive suggestions to the administration officers. To this end specialists of high grade, often times devote their whole lives to a study of the hazards of a particular industry. It is the specialization and the certainty of remaining in a chosen line regardless of political or administrative changes which made the German inspection sys-

tem so efficient. New men entering this profession must start with a thorough theoretical and practical education. They must be graduates of engineering colleges, and are then placed in subordinate positions with little pay for years, before they are promoted to places of real responsibility. I thoroughly believe that the best system of factory inspection is that which is most closely co-related to a system of accident insurance. I understand that your own association has done a large work in reducing fire insurance rates by organizing a system of inspection in connection with your insurance department. Fire-fighting and fire-preventive devices are installed in your factories at the instance of your own officials and for your immediate advantage in the matter of rates. Is this not suggestive of the proper and the best method of factory inspection for the purpose of accident prevention. A system adopted from within is bound to be more efficient than one imposed from without and you can supply the arguments to prove this without any further suggestion from me.

Accident Prevention by Expert Specifications.—A very effective feature of the German accident prevention programme is provided by the adoption of standard specifications for all types of machinery. Expert prevention engineers draft these specifications, and after their adoption by employers' associations, such specifications are insisted upon in the future purchase of all machinery by members of the association.

Organized accident prevention:—

Request to Members.—Buy machinery, apparatus, etc., only with a written guarantee that all protective devices are constructed in accordance with the requirements of our association's accident prevention rules, and stipulate that lacking or unsatisfactory protective devices must be supplied or exchanged free of charge.

The Board of Directors,
German Silk Manufacturers' Association.

Accident Prevention by Co-operation:—

Advice to Members.—Kindly circulate this itemized annual accident report among your factory superintendents, foremen, etc. They should be thoroughly informed concerning causes and consequences of past accidents, with a view of preventing future accidents by keeping up protective devices and discipline and good will of employees.

Chairman,
German Silk Manufacturers' Association.

The above indicate how accident prevention can be promoted by employers' associations. They are translations from the official records of the German Silk Manufacturers' Association.

Analysis, made from reliable figures, points out that it is much easier to prevent machine hazards than those due to human recklessness, carelessness or drunkenness. In 21 years' prevention activities, the total number of workers injured by machines has increased 1 per cent., while the number of workers injured from all causes has increased 4½ per cent., proving that machine hazards are more readily prevented than all others.

And now let me point out to you a few interesting facts bearing upon work accidents from German statistics.

Frequency of industrial accidents according to days and hours:—

This table points out the frequency of industrial accidents according to days and hours. Between the hours of 9 a.m. and 12 noon and 3 and 6 p.m., there are the greatest number of accidents; also, more accidents happen on Monday and Saturday than on any other week day. If we give credit to the general belief that the great percentage on Saturday is due to the fatigue of the workers, we must also likely accept the conclusion that a similar fatigue exists among workers on Monday morning.

Frequency of accidents according to age and sex. Industrial workers:—

Here is a record of the frequency of industrial accidents according to age and sex. In this and the following diagram the increased hazard in all occupations due to age is shewn. Several countries have had sad experience in barring older men from employment on account of their greater liability to accidental injury. Under the German system there is no such disadvantage, and we should see to it that there is none in our country. Another lesson pointed out in this chart is the low rate of accidents to women workers as compared with men in the industries.

Frequency of accidents according to age and sex. Agricultural workers:—

The rate of accidents to women workers is much higher on the farm, as is shewn in this chart, illustrating the fact that accident compensation, insurance, and prevention has as large a field on the farm as in the industries.

Germany finds that one of the most important requirements in the direction of efficiency is prompt and proper medical aid. Authorities all agree, and are very emphatic on the point, that immediate attention to all injuries saves much suffering, many lives and limbs and a great deal of money. This principle has been recognized by progressive employers and insurance companies in the United States, but prompt relief is still lacking in too many instances. Under the German law every injured worker and his dependents are taken care of automatically and immediately after the occurrence of an accident. The first thirteen weeks the injured receives medical attendance and compensation out of the sickness insurance fund. Beginning with the fourteenth week it is provided out of the accident insurance fund.

Efficient medical attention pays—Germany.

A Bavarian Building Industries Employers' Association established to its own satisfaction, that the expenditure of approximately $8,000 in prompt and expert medical attention to its injured workmen, saved approximately $160,000 in compensation expenses.

Saving due to prompt "first aid" to injured workers—Austria.

A Vienna insurance institution figured the net savings in compensation due to the establishment of an ambulance and first aid medical station to be $25,000 in nine months.

An illustration.—An engine driver, 35 years old, was scalded during a wreck. The attending physician thought amputation of the left arm necessary. The Employers' Association through specialists' treatment at its own hospital, succeeded in saving the arm and bringing it back to normal strength. At the time of the accident the driver earned $330 per annum—a few years later, $425 per annum, proving his earning capacity unimpaired. The amputation of the arm would have made a cripple, with less than half earning capacity, necessitating a life compensation of $150 annually, equal to $10,000 total expense to the Employers' Mutual Insurance Association.

Strong factors in accident prevention on the continent are accident prevention institutions, or museums; that is, permanent expositions, usually "working exhibits" of safety appliances.

To give even the most superficial report of the excellent work of the institutions which we have visited in Amsterdam, Paris, Brussels, Berlin, Munich, Vienna, Buda-Pest, Zurich, and Milan, would require too much time now.

I had the pleasure of meeting the chief factory inspector for the Province of Quebec recently, Mr. Guyon, and he called my attention to the Museum of Safety Appliances located in Montreal. I hope to visit this at an early date. You are, no doubt, aware that we have also established within the last year a Safety Museum which, under the name of the American Museum of Safety, is making a small, but promising beginning.

(Accident prevention in the United States.)

Let no one imagine that accident prevention is unknown in the United States. Quite a number of American employers are making praiseworthy efforts in safeguarding their factories and machines, and the best casualty insurance companies in our country have large and well equipped prevention departments, supervised by experts of the highest grade. But our efforts are not sufficiently general and systematic. Eventually, we will outdistance Europe in prevention activities, as we have in other directions, but it requires the patriotic effort of all of us to bring this about.

It is a mistake to think that the most effective safety devices consist of complicated machinery and expensive appliances. Rubber tips and sharp points attached to the feet of ladders prevent more accidents than costly guards attached to intricate mechanism.

Falls from ladders are responsible for more accidents in the industries, on the farms and in the homes than any other source according to 25 years German statistics. Experts estimate that it is possible to prevent 300,000 painful accidents and the loss of $40,000,000 annually in the United States, by proper precaution in the construction and use of ladders.

In large plants in the United States, accident-prevention rules must often be printed in 10 or 12 languages to be understood by all employees. The warning sign here illustrated, taken from the records of the United States Steel Corporation, can be read in all languages, even by illiterates.

Simple but effective danger signs work wonders.

Many accidents to man and beast are caused by slipping on smooth iron covers on our city streets and sidewalks.

There is as much room for accident-prevention activities upon our city streets as there is in our shops.

A Simple Safety Hammer.—A large, progressive industrial establishment found that four workers lost each one eye in nine months, due to nails flying when struck on a slant by the ordinary carpenter's hammer, in closing packing boxes. The adoption of hammers with corrugated surface, shewn in illustration, has prevented losses of eyes and injuries to hands.

Many of our progressive manufacturers are doing splendid work in accident-prevention.

Pure air and absence of dust are splendid health preservers.

The National Association of Manufacturers is conducting and extending an educational compaign with the aid of stereopticon talks and moving pictures. We have in St. Louis, inaugurated half-hour daily talks in centrally located headquarters, where employers, superintendents, foremen, and workers can see the best and latest efforts.

However, the principle requirement is the right spirit and the constructive co-operation of all the forces of society. I express the hope that the combined effort of all the people interested in this subject will strengthen accident prevention movements everywhere.

Upon the next principle I find myself at variance with the views expressed by your legal secretary. The view adopted by our association is as follows:—

"Since progressive individuals usually provide voluntarily for reasonable accident compensation, it is right that reactionary or selfish individuals be compelled to do likewise, through universal compulsory insurance," and

"To prevent unfair competition between employers in different localities, it is necessary that compensation laws of the various States are reasonably uniform."

It is quite evident that the burden placed upon the industries of one province of the Dominion should be placed upon every province, and if placed upon one State of the Union, should be placed upon every State; otherwise, competition between the provinces or between the States might be ruinous to the province or the State which has the most stringent compensation laws. Let me be sure that I am not misunderstood to mean that compensation laws adopted in the States of the Union would have any competitive ef-

fect upon the provinces of the Dominion, or vice versa. It would not materially effect competition between different countries, it would only effect competition between the provinces or States of one country.

In a draft resolution prepared by your legal secretary, he has expressed this view:—

"The system of compensation should be, so far as possible, voluntary. A system of compulsory insurance, such as that in force in European countries, is not compatible with Canadian political institutions and ideas."

With all deference I am unable to agree with this opinion.

The history of European accident-prevention and compensation indicates that in no country voluntary action has been a success. It was attempted in Germany, but it was found after a number of years that a very small number of employers and workers had taken advantage of their option, but a few years of compulsory insurance practically covered every workman of the Empire, and at present we are told that practically every wage worker of the German Empire is insured. The majority of progressive European employers, including England, are in favour of compulsory insurance, the compulsion, however, only to cover the final results to be accomplished and not the means to an end. In other words, it gives no advantage to insurance companies, since employers under the laws of many European countries have the option to comply with the obligation by either State insurance, individual relief system, stock insurance concerns, or mutual insurance. Up to a few years ago there was still a minority among European experts in favour of voluntary action, but at the International Congress in Rome several years ago, the Italian and French experts, who had been up to that time, leaders of this minority in favour of voluntary action, openly declared themselves converted, and there is no further difference of opinion among European experts—all of them favour the compulsory system. The trend of English thought is best shewn in the fact that the recent insurance laws for sickness and invalidity make insurance on the contributory principle compulsory.

And here perhaps you will permit me to refer briefly to an advantage which you here in Canada have over us in the United States in handling this whole subject of workmen's compensation. In the United States both the Federal

and State Governments are restricted by constitutional limitations, which prohibit amongst other things legislation depriving any person of property without due process of law. On this constitutional rock most of the systems of the States so far devised have gone to pieces. The Compensation Act of the State of New York, passed in 1909, was recently declared invalid as infringing upon this provision of the Constitution. I understand from your attorney that there is no such obstacle in the way of your Provincial Legislatures and that you are free to adopt any system that commends itself to you. You are to this extent, therefore, at an advantage as compared with our legislative bodies.

We come now to the last principle laid down by the National Association of Manufacturers:—

"Single liability is essential for reasons of efficiency and equity."

I see that your attorneys are of the same mind on this point, because in one of your documents I have read this.

"The system of compensation adopted should relieve the employer from any other legal liability except in cases of gross carelessness, negligence, or actual wrong on the part of the employer."

Our own conclusions are in full harmony with your argument. It has been found everywhere, and particularly in the last year in the United States, that a system which leaves two or three remedies is little better, and maybe worse, than our old liability system. English employers have had very unsatisfactory experience with their system of compensation, which provides that injured wage workers can sue under the common law, for much higher damage than that provided under the compensation law; then, if they cannot prove their claim under the common law, they can still turn around and ask relief under the compensation law. Many of the English employers to whom we have personally spoken consider the option which it gives wage workers to sue either under the common law or the Compensation Act, as the worst feature of the present English accident-prevention system.

And now in concluding my remarks, let me again call your attention to the fact that neither in an hour, nor in a day, nor in a week, could I impart to you all that every progressive employer ought to know on this subject. We are too busy men, and it is difficult for us to find time for matters

outside of our business affairs, but it is our duty to work constructively for better laws to prevent accidents and to compensate workmen injured at work without their fault. The employers of other countries have considered it their patriotic duty, as well as good policy, to work constructively for progressive, enlightened, humane laws, and I am confident, the employers of Canada, and of the United States are as enlightened and progressive in this matter as the employers of any country in the world.

We cannot hope to settle this whole subject by laws. Laws have ever been made to make men idealists or leaders in righteousness; laws are made to keep men from being criminals, drunkards, and brutes. Laws on this subject, as on any other, should cover only the minimum effort that must be made, and voluntary action must be the force that spurs Canada as well as the United States to the maximum effort in behalf of humane industrialism. This is a big subject, and it requires the combined efforts of the best men to bring it about.

AMERICAN BAR ASSOCIATION.

The meeting of the American Bar Association held in Boston last month, was a notable one. The association is an important and influential body. It was at one of its meetings that Lord Chief Justice Russell delivered his celebrated address. It was at a meeting of the American Bar Association at Detroit (since the Alaska Boundary Award) that Chief Justice Lord Alverstone did not deliver his promised address to which the disappointed members had looked forward with pleasure and expectation.

The Boston meeting was ably presided over by Mr. Edgar H. Farrar, of New Orleans. At the head of the various sections were several eminent jurists of repute, of whom it will suffice to mention the Hon. Simeon E. Baldwin, chairman of section Legal Education and director of the Compapative Law Bureau, Mr. William R. Vance, of Yale, president of the Association of American Law Schools, and Mr. W. G. Smith, president of the Conference on Uniform State Laws.

The high standing of the association is indicated by the circumstance that President Taft cut short his holiday to motor to Boston to make a speech at one of its meetings. This speech dealt with many topics in a forceful and common-sense way, and ended with a powerful plea for the cause of International Arbitration. One could not fail to be impressed with his high purpose and obvious sincerity.

I remarked to a distinguished southern counsel that there was absent from the President, every characteristic of the demagogue. The answer was:—

"Yes, Taft is the best President we have had since Lincoln, but, I am sorry to say, there is very little chance of re-electing him."

The reception accorded to an observation about his predecessor filled me with astonishment. The speaker said that history would write the record of the administration of President Roosevelt in the few words, "Much said and little done;" and I asked whether he of the Big Stick was not still considered one of the heroes of the United States. The answer was that a few years ago any speaker venturing such a criticism of Roosevelt would have been mobbed, but that now the view of most thinking men in the United States was that ex-President Roosevelt was a dangerous demagogue, who had already wrought incalculable mischief.

Space would not permit me to give an account of the many learned discourses one had the privilege of hearing. In all the addresses and discussions, one noted the marked respect with which decisions of the House of Lords were invariably referred to.

There was a discussion in regard to the recall of Judges, which two of the crude Constitutions of proposed Western States provided for. When it is borne in mind that such a monstrosity destroys the very foundation of the security of life and property, it seems strange that it should be seriously considered in the twentieth century. When analyzed, it means mob rule in its worst form. Certainly it would paralyze the impartial administration of justice, which, after all, is the chief duty of the State.

President Taft, no doubt, did right in vetoing the provisions of the Western Constitutions for the recall of Judges. So did Socrates long ago, when as Epistotes, he resisted the popular clamour, and refused to submit to the furious Athenian mob an illegal resolution, condemning the eight

commanders, who had won the battle of Arginusae, but were charged with having sacrificed the lives of friends of influential citizens, and with having neglected to recover the bodies of the dead sailors. This, however, was one of the elements which led the Athenians to condemn their wisest man to drink the hemlock. The Athenians had the advantage of the statesmanship and prudence of Pericles; they were taught by Plato, and instructed by Thucydides and Xenophon. Their minds were illuminated by the art of Phidias and Ictinus and by the genius of Sophocles, Euripides, and Aeschylus. Nevertheless the demagogues triumphed and Athens fell.

The future of the United States is on the knees of the gods; but I may be permitted to express my humble opinion, that, however, much temporary mischief the demagogues may do, yet the common sense and robust virility of the people of the United States will ultimately surmount all difficulties.

After the serious business was concluded, there was the inevitable banquet, made doubly enjoyable by the courteous hospitality of Mr. Fred. Wadhams, and the ready wit of the toast-master, Mr. Beck, the distinguished New York counsel.

One of the features of the banquet was an oration by a western spell-binder. I had never heard a real spell-binder before, and it was a unique experience. It would be a violation of the laws of hospitality to criticise his speech. But to shew that such a style of oratory is not universally approved in the United States, it may not be out of place to say that judgment of the oration by a Boston friend was expressed by a very emphatic translation of the phrase "*vox et præterea nihil.*"

Another pleasant feature was a reception at Harvard University, which is now presided over by Lowell, the author of the *Government of England*, which contains the best account in existence of our system of Party Government.

The beneficent influence of Harvard University extends far beyond the boundaries of the United States.

By the defeat of Reciprocity, Canada loses the services, as a Minister of the Crown, of a very able and distinguished graduate of Harvard, but according to the press reports, another Harvard graduate will hold an even more influential position in the Borden Government. The Harvard Law School is one of the best in the world, and renders great

service to humanity by shedding abroad the gladsome light of jurisprudence.

In concluding this brief account, prepared at the request of the editor, of my humble efforts to represent the Ontario Bar Association, I desire to express my appreciation of the constant courtesy and generous hospitality of the officers and members of the American Bar Association, and also of the Massachusetts Bar Association.

I was requested to assist Mr. A. H. Clarke, K.C., in representing the Ontario Bar Association, but it was a matter of regret both to myself and the members of the American Bar Association, that Mr. Clarke was unable to attend. It may be that he decided not to go to Boston, because he recollected that Richard Clarke was the consignee of the famous tea thrown into Boston harbour. The modest tax imposed by the British Parliament was so moderate compared with the heavy taxes of the present day, that the good people of Boston seem rather to regret the violence of their ancestors, and certainly would have welcomed Mr. Clarke, and reminded him that they were proud of the distinguished grandson of his Boston namesake, who became Baron Lyndhurst and three times Lord Chancellor of England. It is a curious fact that, as pointed out by J. B. Atlay in his excellent biographies of the Victorian Lord Chancellors, the first Lord Chancellor of Queen Victoria was born in Boston, and that the last (Lord Herschell) died in Washington. It is correct, though it seems strange, to refer to Lord Herschell as the last of the Victorian Chancellors, while his predecessor, the venerable Lord Halsbury, still survives to edit the monumental work on the Laws of England, with which his name and fame will always be honourably identified.

Toronto. J. M. CLARK.

COMPANY LAW.*

One of the aims of Imperial Company Legislation from the time of the Act of 1862, has been to exercise a supervision over companies that offer their shares to the public, and at the same time to give as great freedom to the company as is consistent with protection of the public. In working out the provisions of the Act of 1862, experience shewed the desirability of certain amendments, with the result that the tendency of the legislation in respect to the supervision of companies has been towards greater stringency in the methods designed for the protection of the public, chiefly in the direction of compelling a company which offers shares to the public to take the public into its confidence in respect to its affairs.

It is proposed in this article to make a comparison of the provisions of Canadian with Imperial legislation in respect to this matter of protection of the public. Some of the principal methods adopted with a view of exercising a supervision over joint stock companies are: (a) The requirement of annual returns to the Government. (b) The regulation as to the issue of the prospectus, and as to what it shall contain. (c) Compulsory appointment of auditors. It will be convenient, therefore, to make our comparison under these headings.

A. ANNUAL RETURNS.—The Dominion legislation as to returns followed the provisions of the Imperial Act of 1862, but stopped there. In other words, none of the subsequent amendments as to returns enacted by Imperial legislation has been adopted by the Canadian Parliament. In fact, Canadian company legislation, provincial and federal, presents rather a motley appearance in this as well as in some other respects. We find, for example, that, whilst the Canadian Act is still clothed in some of the cast-off sections of the Imperial Acts of 1862 and of 1867, the British Columbia legislature has adopted the latest fashion as set forth in the Imperial Act of 1908; and Ontario is somewhere between the two, having adopted much of the Imperial legislation in 1900, but not having followed the further amendments of 1907 and of 1908. No doubt, the Ontario legis-

* The University Magazine.

lation, in the revision which is shortly expected, will be brought up to date.

The scope of this article will not, however, permit of tracing the comparison through all the provincial Acts, and will, in the main, be confined simply to a comparison between Imperial and Canadian legislation, meaning by Canadian legislation that of the Parliament of Canada. It should also be explained that the following remarks do not apply to the class of companies which come under special statutes, such as railway companies and insurance companies, but only to companies which come under the provisions of R. S. C. c. 79, and which may be broadly described as commercial or trading companies.

The provision of the Canadian Act R. S. C. c. 79, s. 106, as to returns in the case of companies, except loan companies, from which returns are required, is as follows: Companies incorporated under letters patent are required to make a return to the Secretary of State whenever a written request shall be made by him therefor, shewing, (a) The amount of the capital of the company and the number of shares into which it is divided. (b) The number of shares taken from the formation of the company up to the date of the return. (c) The amount of calls made on each share. (d) The total amount of calls received. (e) The total amount of calls unpaid. (f) The total amount of shares forfeited. (g) The names, addresses, and occupations of the persons who have ceased to be members within the twelve months next preceding, and the number of shares held by each of them.

This provision applies only to companies which come under Part I. of the Act. There is no provision made for returns in the case of companies incorporated by special Act. This, as before remarked, is the same provision as was contained in the Imperial Act, 1862. The Imperial Act, as now amended, calls for an annual return of all the above particulars and of many more, the most important being those called for by sub-section 3 of section 26 of the Act of 1908, which provides that the returns must include a statement in the form of a balance sheet audited by the company's auditor, and containing the summary of its share capital, its liabilities and its assets, giving such particulars as will disclose the general nature of these liabilities and assets, and how the values of the fixed assets have been arrived at.

Now, whatever may be the opinion as to the Canadian Act being sufficiently stringent in the matter of returns, it is quite evident that far more protection is afforded to the investing public under this section of the Imperial Act than is afforded under the corresponding section of the Canadian Act. Under the Imperial Act the return must be annual. Under the Canadian Act the return, when there is any provision for a return, is to be made only when required by the Secretary of State. Under the Imperial Act the assets and liabilities must be disclosed. Under the Canadian Act it may be practically impossible even for a shareholder to obtain this information. Under the Imperial Act all that is necessary for either a shareholder or an outsider in order to obtain information which it would be practically impossible to get under the Canadian Act, if the directors chose to withhold it, is to send for a copy of the returns, for which a small charge is made.

The foregoing remarks must be qualified in one respect; namely, that loan companies, which come under the provisions of Part III., are required, under the Canadian Act, to make an annual return, and to disclose their assets and liabilities, the amount of their investments, the average rate of interest, and the extent and value of their lands.

No doubt, objections to this regulation requiring a company to disclose its assets and liabilities will suggest themselves, but the necessity of protecting the public should be paramount. The Imperial Act has met, to a great extent, many objections which might be urged by the recognition of what is defined in the Act as a private company, that is, a company that is limited as to members, that does not offer its shares to the public, and that restricts the transfer of its shares. These private companies are not obliged to make a return of their assets and liabilities, and are exempted from other provisions of the Act designed to protect the public. The legislation, in effect, says, "you may trade as a company with all the advantages of limited liability, and the legislature will not require you to disclose your assets and liabilities so long as you do not go to the public for your capital; but if you offer shares to the public, then you must disclose to the public the position of your company."

B. PROSPECTUS.—The prospectus is the document by which the public is invited to invest in companies, and it has always been a fertile source of litigation. One of the

mischiefs which the Imperial legislation sought to remedy by way of regulation of the prospectus was the concealment by fraudulent promoters of the real vendor to the company; and, accordingly, in 1867, it was enacted by the Imperial legislature that a prospectus was to be deemed fraudulent unless it disclosed all contracts made with the company or the directors and promoters. That section was adopted by the Canadian legislature, and though repealed in England by the Act of 1900, it is the section which appears in the Canadian Act of to-day as R. S. C. c. 79, sec. 43. It provides as follows:

1. Every prospectus of the company, and every notice inviting persons to subscribe for shares in the company, shall specify the date of and names of the parties to any contract entered into by the company or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors of the company or otherwise.

2. Every prospectus or notice which does not specify such date and name shall, with respect to any person who takes shares in the company on the faith of such prospectus or notice without notice of such contract, be deemed fraudulent on the part of the officers of the company who knowingly issue such prospectus or notice.

This section is expressed in very wide terms, and a literal compliance with it would, in many cases, be very onerous, if not impossible. Consequently the Courts, in interpreting it, held that what was meant by "every contract" was "every material contract," meaning by "material" every contract which would be likely to influence the judgment of an intending applicant for shares. It was, as we have seen, repealed in England in 1900, and a new section containing many more regulations as to the prospectus was enacted, and this section of 1900, with some modifications, now appears as section 81 of the Imperial Act of 1908. Without giving the provisions of section 81 in detail, it will be sufficient to note that, among other things, it requires: A statement of the minimum subscription on which the directors may proceed to allotment, and the amount payable on application and allotment on each share, and, in case of subsequent offers of shares, the amount offered and paid on each previous allotment. A statement as to shares and debentures paid, or partly paid, otherwise than in cash. The names and addresses of the vendors of any

property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of the issue of the prospectus, and the amount payable in cash, shares, or debentures, to the vendor. A statement of the amount paid or payable as purchase-money in cash, shares, or debentures for any such property as aforesaid, specifying the amount, if any, payable for good-will. A statement as to commission paid for subscriptions for shares or debentures. A statement of the amount or estimated amount of preliminary expenses. A statement of the amount paid within the two preceding years, or intended to be paid, to any promoter, and the consideration for any such payment.

Section 80 requires that the prospectus be filed with the Registrar.

The sub-section of section 81 which is substituted for the provisions still contained in the Canadian section, provides for a statement of the date of, and parties to, every material contract, and a reasonable time and place at which any material contract or copy thereof may be inspected; but this requirement is not to apply to contracts entered into in the usual course of business, or to any contract entered into more than two years before the date of issue of the prospectus. Further sub-sections require the names and addresses of the auditors, and full particulars of the nature and extent of the interest of every director in the promotion of, or in the property proposed to be acquired by, the company.

The provision as to minimum subscription was enacted in order to remedy the abuse by which directors often went to allotment on what is described in the Encyclopædia Britannica, in the article under the heading "Company," as "a scandalously low subscription," and under another section of the Act, section 85, the directors are not allowed to proceed to allotment until the amount named as the minimum subscription in the prospectus, and, if no amount is fixed, then the whole amount, has been subscribed, and the amount in each case has been paid; and section 87 provides that a company shall not commence business or exercise any borrowing power unless shares held subject to the payment of the

whole amount thereof in cash have been allotted to an amount not less than the minimum subscription.

The provision of the Canadian Act, section 26, Part I., is that the company shall not commence business or incur any liability before ten per cent. of its authorised capital has been subscribed and paid for. Part I. of the Canadian Act also provides that not less than ten per cent. of the allotted shares shall be called in and made payable within one year from incorporation, and that the residue shall be made payable as provided by the letters patent, the by-laws, or the provisions of Part I. Part II. has the same provision as to the first call of ten per cent., but provides that the balance must be paid ten per cent. yearly.

Under these provisions, the ten per cent. need not be paid in cash. It may be all paid by transfer of property. Under the Imperial Act, the minimum subscription, which must not be less than five per cent., must be paid in cash, but the point in this connection is the difference between the two provisions as to publicity. Under the Imperial Act the amount on which the directors proceed to allotment must be stated in the prospectus, so that anyone seeing the prospectus would know whether the subscription required was five, ten, twenty, or one hundred per cent., and could form some idea of the actual cash capital of the company. Under the Canadian Act this is not necessary. The Imperial Act further provides that if a prospectus is not issued, a statement in lieu thereof must be filed. This provision, however, does not apply to private companies, and they can commence business without filing either a prospectus or a statement.

Some of the provinces, such as Ontario and British Columbia, have adopted the foregoing provisions as to prospectus and minimum subscription, but Nova Scotia has the same provisions as in the Canadian Act; it has, in addition, the directors' liability provisions adopted by the Imperial legislature in 1890.

Another of the foregoing provisions of the Imperial Act which requires comment is that which provides that the prospectus should include a statement of the vendors of property, to be paid for wholly or in part out of the proceeds of the issue, and the amount payable for such property in cash or shares and debentures, and the amount payable for goodwill.

This, with another provision which will be noticed presently, is directed against the watering of stock. One of the common abuses of company law is the sale by promoters or directors of their own property or business to the company at greatly exaggerated prices, in return for paid-up stock; and the good-will of a business being hard to value precisely is one asset which, in this kind of a deal, is often greatly overvalued. Naturally in such cases, where promoters are selling their own property, they are not anxious that the public should know it.

In order to check this abuse a provision was made in the Imperial Act of 1867, by which a contract was required to be filed with the registrar whenever stock was paid for otherwise than in cash. If the contract was not filed, the shareholder was liable in a winding-up to pay the full amount of his shares. This provision, which is in force in some of the provinces to-day, was found to work hardships in cases where people had honestly given property of adequate value in exchange for paid-up shares, but had, through inadvertence, failed to file a contract; consequently the foregoing provisions and the provisions contained in section 86 of the Act of 1908 were passed. Section 86 provides that the contract must be filed, but places the penalty for not doing so on the directors, instead of, as formerly, on the shareholder. The effect of these provisions is that if shares are paid up by means of transfer of property, the public has a means of knowing whether the vendors are disinterested, and of judging of the value the company has received for its paid-up shares. A recent well-known American writer, in discussing these provisions, makes the following observations: (See Machen's Modern Law of Corporations," Par. 786), "Shares are issued as fully paid, but representing little or nothing in real value. The company's nominal capital is placed at a fabulous inflated figure, and unwary investors—lambs, in the language of the stock exchange—are deceived into believing that a company with so large a capital must have sufficiently strong financial support to insure its success. . . . It is investors in the company's securities and the public at large upon whom the evil weighs most heavily. At all events the rules of law which prohibit fraudulent or collusive overvaluations of property accepted in payment for shares afford little or no protection. . ." Par. 795: "Some method of enforcing publicity as to the property which is accepted in

payment for shares of stock is probably the true remedy." Then, after noting the objections to the section of 1867, the author sets out the above amendments to the English Act.

With the exception of the "material contract" section of the Act of 1867 (sec. 43 of the Canadian Act above set out) the Canadian legislature has not adopted these or any other provisions designed to check the abuse of watered stock. It is apparent on the face of it that the Canadian section only provides against part of the mischief. It is not obligatory that a prospectus should be issued or a statement filed in lieu thereof. It does not cover a case where the contract is made after the issue of the prospectus. It only applies to some of the classes of companies which come under the Canadian Act; and it is a very difficult section, as we have seen, to construe intelligibly.

If the abuse is to be dealt with, it should be dealt with as adequately as possible, either by the adoption of the Imperial amendments or by other effective means.

And here it may be noted further that the Canadian Act does not contain any provisions corresponding to those which are generally known as the directors' liability provisions, which were enacted in England in 1890, and now appear in section 84 of the Imperial Act, 1908. The object of these provisions was to shift the onus of proving fraud in the case of a misstatement in the prospectus from the shareholder to the director. Under the previous law the shareholder had to prove not only the misstatement but that it was made fraudulently by the director, a thing which it was often impossible to do, even in cases where there was little doubt of the fact, and to get over this practical difficulty these provisions were adopted.

C. AUDITORS.—The provision of the Imperial Act, making the appointment of auditors compulsory, and prescribing their duties, needs no comment. Respectable companies always have auditors, but the Act is directed against companies whose respectability is not above suspicion. The Canadian Act contains no such provisions.

To sum up: as compared with Imperial legislation we find the Canadian defective in its provisions for the protection of the public. (a) In providing means by which the public can readily ascertain the position and financial standing of the company. (b) In protecting it against the evil of

watered stock. (c) In protecting it against the fraudulent statements of directors.

Of course there is always the question as to whether the public should be protected. But even the strongest opponent of anything approaching paternalism would hardly refuse to place a policeman at a spot where it was known that a burglar would enter.

No doubt there may be differences of opinion as to some of the details of the above provisions, but the evils are admitted by every one. Moreover, not only English but American experts agree that the best cure that can be devised is more publicity, and it is just in this respect that the Canadian Act and those which are similar to it, are defective. This need of more publicity will be more readily appreciated when we remember that under the provisions of the Canadian Act a shareholder practically knows nothing of the affairs of the company, except what the directors choose to tell him. He can see the statement at the annual meeting, but he cannot examine the books, except the books shewing transfers of shares, nor obtain extracts from the books, nor, in short, ascertain the position of the company except from the directors. It is true that there is a process provided by the Act by which, theoretically, its position can be ascertained by the shareholders, but it involves an application to the Courts and the risk of incurring heavy costs, and is altogether so cumbersome that it is seldom, or never, resorted to. Apart from everything else, such an application would tend to have as disastrous an effect on a company as an application to wind up.

So far as the Canadian Parliament is concerned, there may be, and no doubt are, reasons why no attempt has been made to remedy by legislation many of the evils which have been referred to. In the case of returns, for instance, the Canadian legislature may very well consider that most companies are already furnished with sufficient occupation in making the returns required by the provinces under the provisions as to extra-provincial companies. But would not a simplification be effected if the Dominion and the provinces were, as far as possible, to make the provisions of their Companies Acts the same, and a simple way of doing this would be to follow the evolution of Imperial legislation, on which much of our legislation is founded, and to adopt the amendments made from time to time by the Imperial legislature.

If it should be asked why we should adopt the amendments of the Imperial Act instead of making our own, the answer is that there is no reason if we can provide equally, or more, effective remedies. But it should not be forgotten that the development of Imperial company legislation has been an evolution determined by actual experience in order to meet specific abuses, and not an *a priori* set of rules drawn by theorists at random. Moreover, if ability and experience go for anything, we find men like Palmer and many of the eminent English Judges, including Buckley, on the commissions which have considered and drafted these amendments, and all their wealth of experience is at our disposal if we care to use it.

Again, if all Canadian legislation were approximated to the Imperial, we should have the benefit of all the English judicial decisions on the points which arise under the Imperial Act. In fact, we would have a body of the most highly trained experts continually working on the problems which, from time to time, confront us, and the results of their labour would be available to us without any trouble or expense on our part. The benefits to be derived from a uniformity of company law, and indeed of all commercial law throughout Canada, can perhaps only be realized by those who have constantly to deal with commercial interests in different parts of the country. I am satisfied that these (and their number is increasing daily with the expansion of the country) will unanimously endorse any scheme tending towards uniformity, if a commission were appointed consisting of representatives from the Dominion and all the provinces, much, I am convinced, could be done in this direction in a very short time. It is certainly an anomaly that the enactments of our legislatures are found to be one at one stage of the development of the Imperial legislation, one at another, and one at a third stage. It would be easier to understand if each legislature had struck out on original lines, but the position as we find it is hard to reconcile with any intelligible principle of development. We find abuses recognized on both sides of the Atlantic. We find experts on both sides of the Atlantic agreeing that the best remedy is more publicity, and we find either no attempt made by much of our legislation to meet the situation, or else remedies applied that have been tried and found wanting. The Dominion has given us much good legislation in railway

and insurance matters, for instance. Let us hope that in the press of other matters the legislators may find time to take up the question of the Companies Act, and let us hope, too, that the Dominion and the provinces may find a way to get together and harmonize all their company legislation on some intelligible basis.

Toronto. R. B. HENDERSON.

THE LIGHT SIDE OF THE LAW.

PITFALLS FOR LENDERS.

A lamented comedian who used to charm London audiences with his artless confidences and beguile their laughter with pictures of his domestic surroundings, was in the habit of describing his suburban residence, and he would conclude the account of its distinctive features by saying that you could recognize it at once, when passing, by the mortgage on it.

That is, of course, just what you cannot do. You may suspect its existence, but, as a matter of fact, a mortgage is one of the few financial transactions which, in these days, can escape the hateful publicity which interfering legislation seeks to impose upon transactions which sensitive and right-minded people prefer to keep quiet. Therein lies a great difference between raising money on your house and raising it upon the contents of that house.

The mortgage of a house can take any form or, indeed, be utterly formless, and yet be a very perfect pledge. You may have a great parchment Dreadnought, as full of tortuosities and convolutions as a mediæval theologian; or you may have half a dozen lines scribbled on a sheet of note-paper; or you may place the muniments of title in a wheelbarrow and trundle them round to the lender and deposit them without more ado. In each case there is a good and valid security, and a well-organised and equipped department of the Supreme Court will place at the lender's disposal all necessary machinery for extracting his principal and interest to the full limit of the property's value.

If, on the other hand, your necessities drive you to raise money upon what, in humble circles, are known colloquially

as "your sticks," you must steer a dexterous course between two quarrelling statutes; you will deviate at your peril from a prescribed form which has enwrapped itself with something of the tremendous penalties mentioned by the writer of the Revelation in connection with addition to or substraction from the sacred text; and, finally, a registration is essential whereby, within a few days, the discredit of the transaction spits at you from your trade journals.

A mortgage is one of the most ancient and honourable legal transactions. It is also one over which the lay mind and the lay press persistently go wrong. So does the drama. Of course, one does not expect accuracy on the stage; but, at the same time, the number of crises in melodrama which have turned upon an essential misconception as to the powers of a mortgagee is disheartening to a lawyer.

Enter villain: flourishing deed. "Now, Sir Guy, as the clock strikes, my money is due. Pay! or this day thou leavest forever the mansions and fair demesnes which bear thy name."

Groans and attitude of dejection on the part of Sir Guy. Enter lovely heroine, daughter of Sir Guy.

"Spare my aged father. Wait but one hour and all shall be repaid."

Remorseless creditor struck all of a heap by shimmer of heroine's back hair, let down for stage effect.

"Give me this maiden's hand and I will cancel the deed. Refuse it, and ere the speeding of five minutes she and you shall leave these portals for ever."

Rustles parchment ferociously. After which he either gets the maiden's hand and the comic relief his cue, or else the weeping father and daughter "exeunt" into the snow, according to whether the crisis is taking place in the first or (as it ought to do) in the second act.

If the writers of these stirring scenes had the least conception of what foreclosure means—of the six months' interval, of the expense, the delay, the opportunities for wantonly prolonging the thing, the miserably inadequate remedy it proves when at last it is obtained—they would not dare to depict such things. Sir Guy might have ordered the men-servants to eject the bold intruder, and, at the cost of some insignificant proceedings for assault and battery, could have held the fort for a least six months longer.

From a lender's point of view, the worse mortgage is where the borrower himself lives in the house which forms the security. When default is made there is no rent which a mortgagee can collect for himself: there is only the defaulting, and otherwise defiant, owner in the house. Then the dreary and costly business of foreclosure and ejectment has to begin; usually impeded, as much as possible, by the undesirable person to whom you have lent your money. There are people reputed to be rational who won't pay the interest, won't pay the principal, and won't give up the house. An instance occurs to mind of a man of this class who, when at last the legal machinery gave no more openings for delay, said:

"Wants the house, does he? Well, he shall have it by instalments."

The first brick of it crashed through the mortgagee's dining-room window that evening.

There is no doubt that the bill of sale, viewed as a transaction, has managed to surround itself with an atmosphere of discredit. This is due partly to the fact that it is often a strategic device meant for the undoing and forestalling of third parties. There is a class of man who, as a safeguard against the consequences of financial imprudence, has implicit confidence in "putting things into the wife's name." It is a course which often puts that lady to an embarrassing choice between love and duty, and it not uncommonly ends in perjury.

Wise people avoid the bill of sale in any capacity. It can sting whoever approaches it. There is a case on record of a man who obtained furniture on the hire-purchase system, settled it on his prospective wife, gave a bill of sale on it, pawned part of it, and then let the house as a furnished residence. The crisis came when the sheriff levied execution and the landlord distrained simultaneously. It would be an instructive task for a law student to work out the rights of the various parties and place them in order of merit: as instructive for him as, doubtless, it was profitable to the qualified lawyers who handled the problem.

Mortgages—the arranging and carrying through of them—form a lucrative item in a solicitor's business. The "scale fee" is an adequate one and, if he acts for both parties, the

work is less and the total remuneration increased. Nevertheless, perils lurk in these matters for the young and unwary. The more substantial the borrower and the better the security, the greater is likely to prove the difficulty of procuring the rate of interest desired by the lender and the extent of remuneration looked for by his lawyer. When, therefore, these important points are easily won in the preliminary negotiations, it is well to keep a sharp look-out. There is a type of builder who, not entirely out of philanthropy, is ready to place business with the newly-fledged practitioner.

"Nice row of houses: just built, and all well let.—Scale charge? Certainly, sir. Surveyor's fee? Of course; anything reasonable so long as he returns half if the loan doesn't go through. Five per cent. on the loan? Well, suppose I mustn't object so long as I get the full amount."

So the surveyor goes and finds all as stated, the tenants being remarkably respectable and well-contented. Calculations based on the rentals justify a satisfactory report, and the loan goes through. Alas for the lender! He may go twelve months in comfortable security, or disillusion may come with a default in payment of the first interest. That loan represented more than the cost of the property. If the ground-rent had undergone the process humourously termed "improving," the loan was a sum for which the builder would have counted himself lucky to sell the property. And he is now pursuing his disastrous activities in another part of the country and, anyway, is not worth powder and shot.

So the lender becomes mortgagee in possession, or—to put it less accurately, in a legal sense, but more practically—he is owner indefinitely of a row of lightly constructed houses, half empty and half occupied by tenants each of whom has a tale of woe concerning damp walls, peeling papers, leaking pipes, missing fittings, and ominous "settlements."

But what of those bright, contented tenants? Shall a further depth of duplicity be hinted at? Suppose they were relatives and friends of the builders, willing to move into new houses for a short time on easy and elastic terms as regards the actual payment of rent. Such an expedient is not altogether unknown. "Putting in decoy ducks as tenants" is the expressive way in which one builder might refer to it to another over a pipe and a glass.

This is a wicked world.

In Court.

If the proceedings in a Court of law were half as animated and diversified as the popular mind depicts them, it would be necessary to charge stiffly for admission in order to control the attendance. The Press is responsible partly for this overrating of the humour of the business. They report encouragingly the brief flash of humour, and ignore the hours of yawning tedium which precede and follow such rare incidents.

And it is not only in this matter of the comedy aspect of litigation that people go wrong. Here, for instance, is the vulgar idea of cross-examination. Little, nervous man in the box—cashier in some commercial house—had the misfortune to be in his friend's dog-cart when the collision took place; is there to testify that his friend was on the right side of the road and that the plaintiff came round the corner like a fire-engine. Examination in chief just over—a sufficiently unnerving process, with interjected questions from his lordship and frequent injunctions to "speak up:" an art which cashiers have infrequent opportunities, and no reasons, for acquiring. Up rises Mr. Blatter, K.C., with a smile to the Bench and a droll glance at the jury.

"Now, my man, is it, or is it not, a fact that you have been convicted of petty larceny? What? I didn't ask you when. I said nothing about twenty-five years ago. I said, is it, or is it not, a fact that you have been convicted of petty larceny? Answer me, 'Yes' or 'No'!" Beams expectantly at jury, and awaits reply.

Now, without making undue claims for the fairness or intelligence of the English Bar, it may be said that that kind of outrage upon a witness is dead as mutton.

May you not, then, cross-examine to credit? Why, certainly. But if you think that to rake up irrelevant offences a quarter of a century old will injure any credit but that of the party whose case must needs fall back on such devices, you are blind to the essentials of modern litigation. Shew that the little man is short-sighted and had left his spectacles at home; shew that he was dozing and that his eyes were closed; shew that he was courting defendant's daughter, and would be likely to go all lengths in supporting the case of his prospective father-in-law; but don't think you will

help your case by dragging out something which has no bearing on the case and which may have been "lived down" by years of meritorious atonement.

There really is no doubt that the passing of a century or two—a short time in the law, whatever it may be in politics or such-like ephemeral pursuits—has brought about a complete change in these matters. Here, for example, is Attorney-General—not two hundred years ago—addressing a prisoner about to give evidence:

"Thou art an odious fellow, thy name is hateful to all the realm of England for thy pride. I will now make it appear to the world that there never lived a viler viper upon the face of the earth than thou."

If anyone should object that those adjectives and similes are exceptional and possibly were justifiable, it may be added that the Attorney-General in question was Sir Edward Coke, author of "Coke upon Littleton"—an erudite work as often referred to as it is seldom read—and that the prisoner was Sir Walter Raleigh, upon whom, somehow the verdict of history has been that he embodied peculiarly in himself those qualities of chivalry, courage, adventurousness, and patriotism which are the mark of the Elizabethan period.

Nor must it be thought that the Bench of those days was behind the Bar in using a style of address to witnesses which in these days might be the subject of unfavourable comment in the newspapers. Here, for instance, is the terrible Judge Jeffreys emphasising the oath which a trembling witness before him has taken:

"The God of Heaven may justly strike thee into eternal flames and make thee drop into the bottomless lake of fire and brimstone, if thou offer to deviate the least from the truth and nothing but the truth. Shortly after which he informs the witness, "Thou art a strange, prevaricating, shuffling, snivelling, lying rascal."

One trembles to think of the fate of a juryman who should have turned up before that black Judge a quarter of an hour late, and pleaded domestic affliction or the exigencies of his business as any excuse.

Times are changed. The legal swash-buckler has disappeared. Court contests are affairs of the rapier: no longer of the cutlass.

Let us consider for a moment who is in Court on your behalf—assuming, if we may, that honour, obstinacy, or

necessity has made you a litigant. To begin at the lowest rung of the ladder: there is the managing clerk. Though the Court be white with the manifold documents of the case, he is expected by everybody to be able to lay a hand on any particular paper at a moment's notice. He acts, also, as a sort of sheep-dog for the witnesses, to keep them good-humoured, yet within call; to prevent undesirable for-gatherings with the opposing party's witnesses or trackless wanderings having for their object the assuagement of thirst. There is the solicitor, seated by his client and calming his nerves, intercepting useless and distracting instructions aimed at counsel, disguising his own fear lest Eminence, K.C., who is "on" also in another Court, shall fail him at a critical moment. There is junior counsel, alert and anxious, conscious of being responsible for the shape the action has taken—a trifle unnerved by velveted criticism at the hands of Eminence, K.C., at that formal conference following the delivery of briefs—with a battery of reports beside him grievously incommoding his colleagues, and toeing that incredibly fine line which divides the useful, timely prompting from the inopportune, tactless interruption of his learned leader's argument with the Judge. Lastly there is that leader himself. In a spirit of becoming respectfulness let us consider him. That he is of King's Counsel at all means, in these days, something definitely achieved. No imposters, no mere floaters with the stream, get that far. But he has, deliberately, measured himself with giants and must stand or fall by them. A vulgar simile leaps to the mind and will not be denied. He has succeeded in the feather weights and the light weights, and has entered for the heavy weights. No more of the easy, frequent, remunerative, inconsequent one guinea, two guineas, five guineas. No more of the merry cockshy in Judge's chambers. He is never employed, save on critical occasions, and to encounter heavy metal. And he must succeed, or else . . . his clerk, who has launched out a bit, in a suburban sense, complains bitterly and disloyally to his fellow parasites, "I never wanted him to take silk; I hinted where we'd find ourselves." The Bar is the only profession where the most critical step has usually to be taken after middle age, and in the plenitude of a man's social obligations.

Upon the whole, Eminence, K.C., must be the focus of our attention. From the moment that the gentleman in a

wig, sitting immediately beneath the Judge, has called the case, Eminence, K.C., has been in supreme command. He alone then shapes the case, emphasizes or eliminates aspects of it. And in this respect it is difficult not to feel sympathy for him. The difficulties of his task are great; for if the case is won the litigant ascribes the result, naturally, to the merits of his cause and, at most, recognizes tolerantly the intelligent co-operation of his advocates. But if it be lost, then the full tide of disappointment is turned in detail upon the handling of the case. "If he'd only called my Uncle Pumblechook," wails the defeated one; whereas, in fact, the learned counsel, in the fullness of his experience, has deliberately refrained from that hazardous proceeding.

"Which is the witness Pumblechook?" murmurs counsel to the solicitor.

He follows the indicating nod and sees that witness, plethoric, partisan to the finger-tips; so excited that his muttered comments upon and contradictions of the opponent's evidence have already aroused the attention of the Judge. In the exercise of his discretion, counsel has decided that to put Uncle Pumblechook in the box is to make a present to his astute opponent of a first-rate subject for cross-examination. Yet when the case is lost, the client will be firmly persuaded that the refusal to allow that particular witness to blow off steam in the witness-box, is responsible for the catastrophe. An experienced advocate once said:—

"I have always made a practice of calling every witness mentioned in my brief. It has lost me many a case; but it has never lost me a client."

But what of the litigant himself? We speak not of the habitual litigant, but of the vast majority for whom one lawsuit, like one marriage, is sufficient, for better or worse, in a lifetime. For him much experience and some enlightenment is crowded into an hour or two. Let us take him after the luncheon half-hour, for up to that the sequence of events has been far too rapid for any mental precipitate on his part. He has observed in Court not only the débris of a previous case, but the material for the one which is to succeed his own. He has noticed the somnolence of the usher and the preoccupation of the associate, to both of whom his case is but a detail in an eternal order of things —a dismal sequence which they meet without interest and part from without emotion. He has found out that the

leader to whom he has committed his fate is concerned, simultaneously, with another case — of apparently equal importance—in another Court. He has experienced the annoyance which Mr. Pickwick felt on seeing his champion converse affably with the hired advocate of his opponent. he realises, with sudden force, that he is running the risk of having to pay for the whole costly pageant; that he has obtruded his personal matters into complicated organization which makes its living out of such things. He looks across at his opponent Jones, seated by his solicitor, and a feeling of toleration and sympathy towards Jones wells up within him. Why on earth didn't he and Jones discuss the thing over a cigar? But between him and Jones tnere is now a Judge and jury, counsel and witnesses — the whole costly appendage of the law. It is smash or be smashed; so he sets his teeth and tries to follow the drift of the fight which is now raging round the admissibility in evidence of certain letters of which he has but imperfect recollection, and to which he cannot understand why any sane person should attach the slightest importance.

Such may be his thoughts in the thick of the fight. But what if the tide turn against him? Consider what the tragedy of that is to the dumb and helpless litigant who stands to be turned out of Court should one howl of rage or shriek of despair on his part disturb the decorum of the proceedings. The solicitor has suspected it for some time. Eminence, K.C., with his intimate knowledge of the judicial countenance, has known it for some time. And at last it breaks on the litigant's mind. The inscrutable mind of the Judge has revealed itself in observations—slight, but indicative. A witness or two has broken down; a confident one has been mauled cruelly in cross-examination; a conscientious one, being reminded that "you are on your oath, sir," has been but the palsied shadow of his valiant proof. Jones's advocate is smiling, confident, and truculent. Eminence, K.C., and his junior exchange whispers suggesting discord. The great man fires a final shot and disappears in the interests of that other case, now, apparently, shewing the greater sign of vitality. Junior counsel, left alone, carries on a forlorn, rear-guard fight. The solicitor's brow is clouded, and he avoids the eye of his client. Jones opposite smiles and nods confidently to female relations seated at the back of the Court.

It is all over—except taxing the bill. Justice, you may find, is not a goddess holding scales. It is a complicated machine wherein a man may pinch his fingers very badly. It is a field of contest wherein weapons, strange and unfamiliar to the lay mind, may produce dire and unexpected results.

Let us leave the stricken field.

GEORGE A. MACDONALD.

The
Canadian Law Times.

VOL. XXXI. DECEMBER, 1911. No. 12.

THE RIGHTS AND WRONGS OF RIPARIAN PROPRIETORS.

The right to the use of a natural running stream or river belongs by common right to all the riparian proprietors through which or by which it courses. This right can be claimed and exercised by each proprietor against one who above diverts the water from its regular channel or so obstructs it as to cause its natural flow to be checked to such an extent as to work material injury. No proprietor has any property in the water itself; but a simple usufruct while it passes along. If used for business purposes or for irrigation it must be returned to its ordinary channel not sensibly lessened in quantity or deteriorated in quality. In fine this gift, which is for the convenience of all wherever it flows, must be so used by each as not to prejudice the rights of others, either above or below. The two following definitions of these rights and wrongs, one by an English Judge and the other by an American, rank among the best yet given. That by Lord Kingsdown, found in *Miner* v. *Gilmour*, 12 Moore, P. C., page 156, reads as follows:—

"By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up

the stream for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury."

That given by Mr. Justice Story in *Tyler* v. *Wilkinson*, 4 Mason, U. S. R., page 401, is no less explicit:—

"There may be and there must be allowed to all, of that which is common and reasonable use. The true test of the principle and extent of use is whether it is to the injury of the other proprietors or not. There may be a diminution in quantity or a retardation or acceleration of the natural current indispensable for the general and valuable use of the water perfectly consistent with the common right. The diminution, retardation or acceleration, not positively or sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and the general good, and is not betrayed into a narrow strictness subversive of common sense, nor into an extravagant looseness which destroys private rights."

For terseness, for just interpretation of conflicting rights and for an exact summary of settled rules by all great Judges, this definition of Mr. Justice Story leaves nothing to be desired.

Vice-Chancellor Bacon, in referring to the definition of Lord Kingsdown in *Miner* v. *Gilmour*, remarks:—"It was expressed with a concise felicitousness of expression which all Judges may reasonably envy."

The definition of Lord Chancellor Cairns is so apposite that it should not be overlooked. It is found in *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company*, L. R. 7 H. L., at page 704.

Its appropriation for domestic uses and for watering stock has been long settled as a reasonable one, even if a lower proprietor is reduced below his needs for similar purposes. A lower proprietor could yet enforce his rights for the use of running water for domestic purposes and for watering stock against a proprietor further up who should attempt to use it for purely business purposes. In one case the right of its use for domestic supply is an absolute right; while, on the other hand, its use for manufacturing or agricultural purposes is a qualified one.

What is a reasonable use must be determined upon the facts of each particular case, and is a question for the jury.

Chief Justice Shaw, in *Elliot* v. *Fitchburg Railroad Co.*, 10 Cushing, Supreme Judicial Court of Mass., at page 194, thus lays down the law as to what is a reasonable use of flowing water:—"To take a quantity of water from a large running stream for agricultural or manufacturing purposes would cause no sensible or practicable diminution of the benefit to the prejudice of a lower proprietor; whereas, taking the same quantity from a small running brook passing through many farms would be of great and manifest injury to those below who need it for domestic supply or watering cattle, and, therefore, it would be an unreasonable use of the water and an action would lie in the latter case and not in the former. It is, therefore, to a considerable extent, a question of degree; still, the rule is the same, that each proprietor has a right to a reasonable use of it for his own benefit for domestic use and for manufacturing and agricultural purposes."

In 1877 the question underwent careful consideration in a New Brunswick case, *Keith* v. *Corey*, 17 N. B. Reports, p. 400. Plaintiff owned a grist and saw mill on a stream, which had been in operation for over thirty years. Defendant owned land further up the stream and constructed a dam and built a mill, in 1874. It was alleged when the gates of defendant's dam were closed for the purpose of raising a head of water to work his mill sufficient water did not flow down the stream to enable plaintiff to work his. A verdict was entered for plaintiff for $1 damages; and it was agreed that if the Court should be of opinion that the defendant had a right to stop the water and use it for the purpose of his mill, provided he did not detain it for an unreasonable time—which it was admitted he did not do, if he had the right—the Court should enter the verdict for the defendant, or mould the verdict according to the facts, with leave to draw inferences of fact.

Chief Justice Allen on delivering the judgment of the Court, after referring to several English and American authorities, said:—

"The reasoning of the Court in several of these cases presents the rights of riparian proprietors in a very clear and satisfactory light. If the upper proprietor on a stream, owning a mill, is entitled to use the water to work his mill

he must necessarily have a mill dam, and at certain seasons of the year we know that he cannot get a sufficient head of water in the dam to drive his mill without, to some extent, retarding the natural flow of the current and thereby interfering with the working of the mill of the proprietor further down the stream. But if he cannot do this in any degree without subjecting himself to an action, where is his just and equal right with the lower proprietor, to the benefit of the stream? It would cease to be a right, *publici juris*, and become the sole and exclusive right of the proprietor lowest down the stream, who could enjoy the full benefit of the water without any diminution or retardation, and thus be enabled to use his mill without any interruption while that of the upper proprietor is useless for want of water. I cannot think that such a state of things is consistent with that "reasonable use" of the water, which all the authorities agree, each riparian proprietor is entitled to. Would it not be contrary to the maxim *sic utere tuo ut alienum non laedas*? If that rule is to be applied to an upper proprietor in his use of the water, why should it not also be applied to a proprietor further down the stream in his use of it? Does it not shew that the true test of liability is, whether the party has exceeded his right by an unreasonable use of the stream? The difficulty in cases of this kind is to determine what is a reasonable use of the stream by the upper proprietor, and what is an interference with the rights of the proprietor below. The language of some of the cases is not entirely clear, but one principle which governs the whole of them is, that each riparian proprietor is entitled to a reasonable use of the water, and it is only for an unreasonable use of it that an action will lie.

"No question arises here as to the diversion of the water, for the defendant did not divert any part of it from the stream, as in the cases where the water was drawn off for the purpose of irrigation, but he merely obstructed its flow for a time in order to raise the water in his dam, and without which his mill could not work, and after being used in working his mill the whole of the water was allowed to flow down to the plaintiff's mill. It seems to me, therefore, that there is a very material distinction between a diversion of the water by which the quantity in the stream is diminished and a mere temporary obstruction of it which is admitted to be only a reasonable use of it by the upper riparian

owner, a distinction which is very clearly drawn by the Lord Chancellor in the Swindon Waterworks Co. case and in many of the other cases cited, as also in Angell on Watercourses, ss. 99a, 115."

In *Embrey* v. *Owen,* 3 Exchequer, page 352, the Court held defendant was not liable in an action brought by a mill owner for diverting water for purposes of irrigation, where the water used, except that which was absorbed and used in the irrigation, was returned to the stream above the mill, where the diversion was not continuous but only intermittent, and where the quantity of water absorbed and lost was small and inappreciable. Parke, B., in delivering judgment, at page 369, said:—"Though he may use the water while it runs over his land he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above without a grant or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled general doctrine on the subject, and all the difficulty arising consists in the application. The owner must so use and apply the water as to work no material injury or annoyance to his neighbour below him, who has an equal right to the subsequent use of the same water; nor can he, by dams or any obstruction, cause the water injuriously to overflow the grounds and springs of his neighbour above him. Streams of water are intended for the use and comfort of man; and it would be unreasonable and contrary to the universal sense of mankind to debar every riparian proprietor from the application of water to domestic, agricultural and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex,* and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of the party by or over whose land a stream passes,

is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish or affect the application of the water by the proprietors above or below on the stream. He must not shut the gates of his dams and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbour."

In America, a liberal use of a stream or river is generally allowable; especially in case of its use for irrigation and for carrying on manufactures. So in France. The proprietor in the last-named country may make trenches to conduct the water to irrigate his fields, if he returns it with no other loss than that which irrigation caused. In England it is submitted such a user would not be permissible. Parke, B., in the same judgment, at page 371 further remarks: "On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose; on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering pot into the stream, in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of degree, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the limits or not; and in this we think, that as the irrigation took place, not continuously, but only at intermittent periods, when the river was full, and no damage was done thereby to the working of the mill, and the diminution of the water was not perceptible to the eye, it was such a reasonable use of the water as not to be prohibited by law. If so, it was no infringement of the plaintiff's right at all; it was only the exercise of an equal right which the defendant had to the usufruct of the stream."

The question in a recent case, *McCartney* v. *Londonderry and Lough Swilly Railway,* underwent careful consideration in the House of Lords L. R. (1904), Appeal Cases, page 301. Lord Macnaghten, in a remarkably able judgment,

indicated the different ways a proprietor, whose lands are intersected or bounded by a natural stream, may use the water passing by or intersecting the same. First: He may use it for domestic purposes, and for watering his cattle. This he calls primary or ordinary purposes. Such user is absolute or unqualified. He may in the exercise of such rights exhaust the water entirely, and the lower proprietor cannot demur to its use for such a purpose. Second: He may use it for business purposes, such as creating power to drive a mill, or for running a manufactory. The last-named are called extraordinary purposes and must be limited to uses incident to the land, and after use the water must be restored to the stream substantially undiminished in volume and unaltered in character. Under this head the user, while authorized and permissible, is qualified. The user must be reasonable, yet its limit is not definable. For its determination no hard and fast rule can be laid down. This is the province of the jury to be determined by them under the peculiar circumstances of each case as it arises. Third: The proprietor may take advantage of his position to use the water for purposes foreign to and not within the rights attached to riparian ownership. Such was the attempt made in the case last above referred to. The facts were substantially as follows: The respondents' line of said railway crossed a stream by a culvert and they owned a strip of land, at the crossing, of a few feet in width. They claimed the right to place in the stream a pipe to divert the water into a tank, half a mile away from the point of crossing, upon land not abutting upon the stream. The water thus diverted was used in supplying the locomotive engines of the company with water along a line of 40 miles in extent. Further down, the stream was used for working a corn mill. If the pipe were used to its full capacity it might not substantially injure the mill. The mill-owner, having stopped up the pipe, the respondents brought an action against him claiming a declaration of their right to take the water through their pipe, and an injunction. The decision simply turned upon the question: "Could the water from a natural stream be diverted to a place, outside the tenement, and there stored to be used for a purpose foreign to the ordinary uses of the tenement?" It was held, it could not.

Lord Chancellor Halsbury in the course of his judgment remarked: "Now it is necessary to consider what it is the

railway company do, because that is what they claim a right to do. By a pipe placed in the stream at a point where they own some land adjoining the stream they fill a tank with water to be used in the boilers of their locomotive engines. The engines, of course, consume the water in the course of their journeys; the railway itself is forty miles in length, but is connected with other railways over which their engines run for a much greater distance.

"My Lords, if the question were the reasonableness in respect of quantity, I should think it a most unreasonable thing that the use of a stream passing through a very small area of riparian land should be made to extend to forty miles of country, or wherever else the exigencies of the railway service might require. Speaking of it simply in respect of quantity, I think it more unreasonable than supplying drinking water to an asylum built on the banks, which has been held to be unlawful."

Lord Lindley, at page 313, said: "My Lords, although the damage suffered, or likely to be suffered, by the mill-owner is small, yet it is plain that, if the railway company are not entitled to restrain and use their pipe as intended, but are nevertheless allowed to do so without interruption for twenty years, they will be infringing the mill-owner's rights all that time, and will, at the end of twenty years, gain a prescriptive right to continue such use forever. Such an invasion of his rights the mill-owner is entitled to prevent. This has been long well settled. In the note to *Meller* v. *Spatman* it is said: 'Wherever any act injures another's rights and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right without proof of any specific injury.' This principle has been repeatedly recognized and acted upon in cases involving water rights."

It has been held that private riparian rights exist on the foreshore of a tidal navigable river, when left bare on the ebb of the tide; yet, however, when flooded, the public can exercise over it rights of navigation and fishery. It was held in *Blundell* v. *Catterall,* 5 B. & Ald., page 268, the same principle was applicable to the sea and its shores as in tidal navigable rivers. The question was carefully considered in 1878, in a New Brunswick case, *Byron* v. *Stimpson,* 17 N. B. R., page 679. The plaintiff was lessee of a lot of land, which abutted on navigable waters on a large arm of the sea,

leaving on the foreshore extensive flats at the ebb of the tide. On the foreshore, between high and low water mark, the defendant, a fisherman, constructed a wharf and smoke house, in front of plaintiff's holding, thereby preventing the plaintiff from landing his fish and other goods upon part of his land, and becoming a nuisance on account of the smoke from the smoke-house. The defendant contended, as the title to the foreshore was in the Crown, he in common with Her Majesty's subjects, having the right of fishing over it at high tide, could at low tide use it in common for the purpose of prosecuting this industry. The Court, however, held plaintiff had a good cause of action, on account of the violation of a right, as well as for the injury done by the smoke from the smoke-house.

Mr. Justice Fisher, in delivering the judgment of the Court, held, although the right of a proprietor of land on the bank of a tidal navigable river, or the sea shore, are not similar to those of a proprietor on a stream or river above the flow of the tide, and though the title to the foreshore of the former is in the Crown, yet such a proprietor has the right of unobstructed access from his land on the shore to the navigable waters of the bay or sea when the tide is out. He concluded in the words following: "Considering this case entirely in relation to the legal rights of the parties irrespective of the pleadings, we are of the opinion, the plaintiff is entitled to judgment for the injury done to him as a riparian proprietor by the obstruction to his access to the waters of the bay by sea, when the tide is up, and access by land when the tide is out, and also for the injury he sustained by reason of the smoke from the smoke-house, and the verdict for the plaintiff on the several counts, and pursuance of the agreement entered into, will stand."

Summary.

1. The right of the use of running water in its natural course is not an easement; because it is inseparably connected with and inherent in the property in the land, and because it is parcel of the inheritance, and passes with it. It does not require the support of the fee of the water course to uphold it; and it springs as a natural incident of the land's abutting upon the margin of the stream.

2. The right to the beneficial and reasonable use of running water is common to all the proprietors of the lands through which or by which the stream or river flows. Consequently each one is under obligation so to use this common good as not materially to interfere with or essentially prevent an equally beneficial enjoyment of the common right by all the other proprietors.

3. Each riparian proprietor possesses the right to take all the water that may be required for his domestic needs, and likewise for the use of his cattle, even to the exhaustion of the supply. This right is absolute. He has also a qualified right to take and use it for agricultural and manufacturing purposes. In so doing he must neither materially diminish the supply nor unreasonably withhold it, and after user, restore it to the channel of the river before leaving his tenement.

4. The owner of lands adjoining a natural stream has no right to divert the water to a place outside of his holding, and there make use of it for purposes unconnected with the tenement.

5. If a riparian proprietor withholds water and prevents it from flowing in its accustomed volume, or diverts it from its regular channel, without remonstrance or opposition from the proprietor or proprietors below, a grant for such use will be presumed at the end of the period of prescription.

6. "Flowing water is *publici juris,* not in the sense that it is a *bonum vacans,* to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it." Parke, B., in *Embrey* v. *Owen,* 6 Ex. 353.

7. "A stream of water is at first the property of each person through whose land it flows; but the water may be appropriated by an individual, and after he has enjoyed it for a certain length of time, that enjoyment cannot be interrupted, although it might at first have been prevented." Holroyd, J., in *Cross* v. *Lewis,* 2 B. & C. 690.

8. "Every man has a right to have the advantage of a flow of water in his own land without diminution or alteration. But an adverse right may exist founded on the occupation of another. And though the stream be either diminished in quantity or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it have existed for so long a time as may raise the presumption of a grant, the other party whose land is below must take the stream, subject to such adverse right." Lord Ellenborough, in *Bealey* v. *Shaw,* 6 East 214.

9. "The right of fishing in a navigable tidal river is in the public; and the ownership of the land gives the defendant no right to interfere with a party fishing in the river in front of it. The soil of a public river is in the Crown, and the right of fishing belongs to the public. Since Magna Charta the Crown cannot grant the exclusive right of fishing in a public navigable river. The claim set up by the defendant, of the exclusive right to fish in front of his own land, entirely failed." Chief Justice Ritchie, in *Rose* v. *Belyea,* 12 N. B. R. 109.

10. "The right to a natural stream flowing in a definite channel is not confined to streams on the surface, but the right to an underground stream flowing in a known definite channel is equally a right *ex natura,* and an incident to the land itself, as a beneficial adjunct to it." Lord Wensleydale in *Chasemore* v. *Richards,* 7 H. L. C. 349.

11. Where an action for damages by a riparian owner lies for pollution of a stream, the Courts will interfere by injunction to restrain the nuisance, even where no actual damage is proved, to prevent the inconvenience of repeated actions for damages; and also where the act done is claimed as of right, on the ground that the repetition of the act would, at the end of 20 years, establish a right in the claimant in derogation of the prior right.

St. John, N.B. SILAS ALWARD.

ENGLAND AND SYNDICALISM.

It was said by Guizot that the English above all other nations possessed the genius of legality, hence their splendid example of social order to the modern world. More than two centuries before that observation was made, and during the most splendid period in the history of the nation, Lord Burleigh declared with the truest instinct of the statesman that England could only be ruined by her Parliament. In view of some recent political and social occurrences in the heart of the Empire, it is being asked by the thoughtful if the English people are not in a fair way of losing their old-time habit of lawfulness, and if there are not corresponding signs of national decay beginning to manifest themselves in legislation. It is hardly necessary to say that the most discussed of these occurrences are the passage of the Parliament Act—which marked a victory of unthinking democracy over constitutionalism; and the emergence of "syndicalism" from the grave of old-fashioned labour-unionism during the great transportation strike of the past summer. Without debating it, we are free to say that the temper of the House of Commons majority which so unrelentingly assailed the privileges of the Lords is the sort of thing that spells constitutional ruin in the long run. It was tyrannous to compel the peers to submit to an extramural measure shearing them of their ancient prerogative when they undertook to reform themselves along fair and reasonable lines. So much for "ruinous" legislation in our times. Now let us see how the proletariat is forgetting its former habit of lawfulness by exploiting "syndicalism."

Since the middle of the thirteenth century, labourers in England have been receiving a money price for their services. Passing over the period when the various industrial guilds flourished—forms of associated labour which knew no distinction in interest between masters and workmen—we find trade unions coming into existence about the middle of the sixteenth century. We very naturally expect such organizations to meet with the hostility of employers, and it is accorded to them without stint. So early as 1548 a statute of Edward VI. was passed for the punishment of certain "artificers, handicraftsmen and labourers" who

had "sworn mutual oaths" to do only certain kinds of work, and a certain amount thereof daily. According to the genial penology of the times, fines, pillory and loss of the ears were to follow upon conviction of any breach of the statute. By reason of the orderly conduct of the class against which these dire pains and penalties were launched, this enactment was allowed to wax obsolete from its passage; and a similar fate attended many subsequent legislative attempts to prevent combinations for raising wages. Popular sentiment as a whole favoured the right of workmen to unite for mutual protection when it was recognized that employers were combined to limit the scale of wages paid. However, it was not until 1824 that Parliament was persuaded to repeal the ancient enactments in restraint of trade unions and to legalize the combination of workmen so long as the unions refrained from violent interference with persons who might refuse to join them. Since that time down to the present it has to be conceded that, on the whole, trade unionism has been beneficial to the country in that it has on the one hand prevented the growth of anarchical sentiment among the proletariat, and on the other hand afforded some measure of protection to workmen against the aggression of employers. They have not been able to prevent some unreasoning and wasteful strikes, it is true; but on the other hand they have undoubtedly obviated many others justifiable enough in right and equity. But this is a matter of common knowledge.

Coming now to a consideration of the outstanding features of the recent strikes in England, it is obvious to the most casual observer that they are of an entirely different class from anything characteristic of former strikes there. Hitherto each department of labour was controlled by its own special organization, which was absolutely autonomous and independent of control by other organizations. Membership in these unions was expensive and onerous, and its standards excluded the unskilled and the idle revolutionary. The unions fought the employers one at a time, and there was no such thing as "sympathetic" strikes. Hence, it was generally easy for the employers to "wear out a strike" without making any very important concessions to the men. As a forlorn hope born of their "genius of legality," the British workman then turned to politics; and a Labour Party was formed to redress all

grievances in a constitutional way. Unfortunately that party was numerically strong enough to be useful to the Government of the day, and its leaders were not able to resist certain "pacificatory lures" which swiftly and inevitably put them among the list of non-combatants. Hence, in an ecstasy of despair, the British workmen have now turned to "continental syndicalism" and the ways of the social revolutionist to obtain redress against the oppressions of capital. Syndicalism means a sympathetic and concerted action on the part of workmen to paralyze the trade of a community where capital and labour are for the moment at war. In England it was applied in this way: the sailors, carters, dockers, and railway men constituted the transport workers of the country. They all walked out—and the whole transportation business of the kingdom was in a state of suspended animation. There were no workers found to take the places of the strikers, as in the days of the strikes controlled by the trade unions. Syndicalism has made all that impossible; for syndicalism is but a concrete embodiment of the essence of anarchistic philosophy, and says to each and every member of the proletariat: Be true to our policy, and in a short time every industry will be controlled by the workers instead of by the capitalists. It is the outcome of the teaching of Prince Kropotkin, whose views in this behalf may be best understood by the simple statement that the railway men shall run the railways, the weavers the cloth trade, the sailors the ships, all these "free groups" of workmen to exchange commodities with each other in the ideal anarchistic community. Of course, the syndicalism of the British workmen is still a long way off from the shores of this Kropotkin utopia. But isn't it wonderful that the stolid Briton, as we knew him, should take any cue whatsoever from Continental sources? And there were scenes of violence during the recent strikes, that shew that the British labourer is becoming tolerant of Continental practices as well as Continental doctrines. Let us hope that this dangerous symptom of national decay will be cured and redressed by legislative readjustment of the present relations of capital and labour. And to this end let us ponder the remarks of a recent writer, who has given much thought to social questions: "The men of light and learning can educate the electorate to some extent by directly addressing them, that is, they can give them light on political questions. And

it is most important that they should do so in order to counteract the effect of the teaching of professional agitators and demagogues, the flatterers of the Demos. On the elementary principles of politics and on important political and social questions, they can address their intelligence, and, if pains be taken, they can enlighten it a little. At present they aim too much at the man of average education, while they should aim much lower. No doubt, it is more easy for an educated man to address an educated than a comparatively uneducated audience; but the importance of the matter makes it well worth our politician making the attempt to descend to their level, and not to speak over the heads of the labouring classes."

Ottawa. CHARLES MORSE.

A LESSEE'S COVENANTS TO REPAIR.*

The Court of Appeal has recently gone to the root of this subject by elucidating at some length the meaning of "to repair," which is usually the governing[1] expression in the covenants under discussion. "Repair," in a general sense, means "the renewal, or replacement of defective parts."[2] Thus a broken earthenware pipe, or a window-frame or a floor, which has become utterly decayed is "repaired" by replacing a new pipe, a new frame, or a new floor; in other words, if the covenantor cannot repair by patching he must perforce incur the cost of restoring.

Bearing in mind what the expression "to repair" usually involves, our next step is to remember that in construing the lease (as in regard to other documents), the surrounding circumstances may be taken into account, except when they conflict with the express language of the instrument. The rule, therefore, obtains that, usually, a covenant to repair must be construed, having regard to the general character of the premises, thus the standard of re-

* THE LAW QUARTERLY REVIEW.

[1] But in framing a repairing covenant it is well to note that "repair" does not extend to cleansing, *e.g.*, the cleaning out of an artificial piece of water (*Bird* v. *Elwes*, L. R. 3 Ex. 225).

[2] *Lurcott* v. *Wakely*, [1911] 1 K. B. p. 924, Buckley, L.J.

pairs required for a fashionable west-end house would be manifestly inapplicable to a small suburban villa.

There is another rule affecting the construction of repairing covenants, which has to be considered, in regard to the standard of repairs, namely the test of what would satisfy the requirements of that useful typical legal entity, the reasonable man. This test was crystallized in *Proudfoot* v. *Hart*.[2] Whether it should be applied in all cases, save when actually repugnant to the language of the lease, has not been decided, but it seems just that this valuable test should be read into every repairing covenant except when inconsistent: examples of inconsistency would be a covenant "to keep in the same condition of repair as at the beginning of the lease," or a covenant to keep in "perfect repair." As to the latter, Lord Esher said in *Proudfoot* v. *Hart*[3] respecting "good tenantable repair:" "The house need not be put into the same condition as when the tenant took it, it need not be put into perfect repair, it need only be put into such state of repair as renders it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it." Whatever "perfect repair" may mean, it is probably safe to conjecture that it is not such as a reasonable tenant would require, but denotes a standard which is higher.

Remembering the general meaning of the expression "to repair," and the rule that the surrounding circumstances at the date of the lease are to be taken into account in construing it, the important question has arisen whether (owing to circumstances held not to have been in the contemplation of the parties when the lease was made), if it becomes impossible to "repair," in the sense of renewing parts of the subject-matter of the covenant rendered defective by the ravages of time, and it becomes only possible to "repair" by rebuilding, the covenantor must replace the whole subject-matter with a new structure. There are fortunately cases which decide that he is not so liable.

Though the justice and good sense of these decisions may be apparent, it is difficult to state the general principle which applies to them. The writer would suggest whether they fall within the extended doctrine of *Taylor* v. *Caldwell*.[4]

[2] 25 Q. B. Div. 42.
[4] (1863) 3 B. & S. 826.

"That case," says Sir Frederick Pollock,[5] "has now been extended to cases where, without the destruction[6] of any material object, a state of things contemplated by the parties as essential for performance according to their true intent fails to exist when the time for performance arrives, and this whether it is expressly mentioned in the terms of the contract, or not." In this connection the following passage may be quoted from *Krell* v. *Henry*:—[7]

"I think that you have first to ascertain, not necessarily from the terms of the contract, but if required from necessary inferences drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited."

In *Lister* v. *Lane*,[8] the leading case on the subject, the substance of the covenant was impliedly to "repair," in the sense of renewing those parts of the demised premises which became defective in the natural course of things during a 7 years' lease. The foundation on which the buildings rested was such that at the end of the lease they required to be rebuilt. So far as the lessees' covenant "to repair" extended (short of actually rebuilding the whole of the structure) they had performed their duty. No doubt, if the premises had been burned down the lessees must have "repaired" in the only feasible way, that is by rebuilding (the possible event of fire being within the contemplation of the parties), but it was not in their minds when the lease was entered into that they would be called upon to rebuild as a consequence of the peculiar nature of the foundation and the great age of the buildings.

[5] Pollock on Contracts (1911), p. 439, and see Anson (1910), p. 354.

[6] In *Taylor* v. *Caldwell* performance was held to depend on the existence of a specific object.

[7] [1903] 2 K. B. p. 749, Vaughan Williams, L.J.

[8] [1893] 2 Q. B. 212, C. A.

The writer would therefore submit that *Lister* v. *Lane* and its sequels are within the extended rule of *Taylor* v. *Caldwell*, because the substance of a repairing covenant is that the covenantor shall make good dilapidations caused by the elements and by the wear and tear of persons using the premises. If it is found impossible to do repairs of that nature because, owing to circumstances which were not foreseen, the entire subject-matter of the contract must be rebuilt, then if performance of that by the covenantor were required it would be necessary to make a new contract between the parties; rebuilding under a repairing covenant in the case of fire is obviously different—fire is an event which is presumably in the contemplation of the parties.

The writer has endeavoured to state the leading principles of the law relating to repairing covenants in the following rules:—

I. A covenant "to repair," or "keep in repair,"[9] obliges the covenantor to restore by renewal, or replacement, such parts of the subject-matter of the covenant as are defective.[10]

Illustrations.

(*a*) A floor is worn out, woodwork lacks paint,[11] a skylight leaks, a roof is decayed, a garden wall falls through perishing of mortar, an earthenware pipe is broken, a window-frame becomes rotten;[12] (*b*) a wall is condemned as a dangerous structure, and is only repairable by rebuilding. In illustration (*a*) if patching is impossible the covenantor must replace the defective parts by putting sound wood into the floor, skylight, roof, and window-frame, repaint where paint is necessary to prevent decay, replace with a new pipe, and rebuild the walls in illustrations (*a*) and (*b*).[13]

II. But a repairing covenant does not oblige the covenantor to repair by rebuilding the whole subject-matter of the covenant if the Court holds that the necessity to re-

[9] *Payne* v. *Haine*, 73 R. R. 629; *Proudfoot* v. *Hart*, 25 Q. B. Div. p. 50.
[10] *Lurcott* v. *Wakely* [1911] 1 K. B. p. 924.
[11] *Proudfoot* v. *Hart* (*supra*), p. 54.
[12] *Lurcott* v. *Wakely* (*supra*), pp. 912, 924.
[13] *Lurcott* v. *Wakely* (*supra*).

build arises from circumstances not contemplated by the parties when the covenant was entered into.[14]

Illustrations.

1. (*a*) An old house, built on timber which has rotted, is only repairable by "underpinning" (*i.e.*, rebuilding on walls carried down 17 feet to the subjacent gravel; (*b*) a house is destroyed by an underground mining explosion, another by the combined effect of earthquake and irruption of the sea, and a third by oceanic erosion; and (*c*) a house is destroyed by fire. In illustration (*a*)[15] and [and it is submitted] in illustration (*b*) (assuming that the events described are held not to have been in the contemplation of the parties), the covenantor is excused from rebuilding the whole of the premises, but in illustration (*c*) he is liable, fire being a presumable contingency.[16]

III. Unless the terms of the lease are repugnant, the surrounding circumstances may (as in the case of other documents), be regarded in construing repairing covenants therein. Therefore the age, class, and locality[17] of the premises may be taken into account in order to measure the extent of the repairs.[18]

IV. "Good tenantable repair," and similar expressions[19] mean such state of repair, having regard to the age, character, and locality of the premises, as would make them reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take them.

V. The words "reasonable wear and tear excepted," and clauses of similar import qualifying repairing covenants mean that if the covenantor has performed those covenants

[14] *Lister* v. *Lane*, [1893] 2 Q. B. 212; *Wright* v. *Lawson*, 19 T. L. R. 203; *Torrens* v. *Walker*, [1906] 2 Ch. 166; as to the last case see *Lurcott* v. *Wakely*, [1911] 1 K. B. pp. 913, 923, 926; and see *Hugall* v. *McKean* (1 C. & E. 391), where a lessor's covenant 'to repair drains was held to apply to drains existing at the date of the lease and not to mean reconstruction of the whole drainage system.

[15] *Lister* v. *Lane* (*supra*)

[16] *Bullock* v. *Dommitt*, 3 R. R. 300.

[17] *Proudfoot* v. *Hart*, 25 Q. B. Div. p. 52. It is submitted that the rule as stated in the case cited has a general application unless repugnant to the lease. Cp. *Payne* v. *Haine*, 73 R. R. p. 631

[18] As to also implying the test of what a reasonable incoming tenant would require (Rule IV.), except where repugnant, see *ante*.

[19] Query, e.g., "habitable repair," *Proudfoot* v. *Hart* (*supra*, p. 51), *Belcher* v. *McIntosh* (56 R. R. 867); "thorough repair," "good condition," *Lurcott* v. *Wakely*, [1911] 1 K. B. p. 918.

at the times specified, or as usage[20] prescribes, he will not be liable for dilapidations arising from (*a*) the ordinary[21] action of the elements or (*b*) wear and tear caused by reasonable user of the premises by persons using them.[22]

Illustrations.

(*a*) Lease to A of a public-house for 10 years, covenants by him to repair every fifth year, qualified by a "wear and tear" clause. At end of fifth year A. does the necessary repairs, and during the eighth year determines the lease; (*b*) B. enters into repairing covenants qualified as above. It is proved to be usual to repair the inside of similar houses every seventh and the outside every third year. B. has done this. A. and B.[23] having repaired at the proper times will not be liable for such dilapidations afterwards occurring as are caused by the ordinary action of the elements, or by wear and tear arising from reasonable user of the premises.

VI. (*a*) The measure of damages for breach of covenants to repair in an action commenced during the continuance of the lease is usually the amount by which the reversion[24] of the premises is injured by the non-repair.[25]

(*b*) The measure of damages for breach of covenant to deliver up the premises in repair, is the cost of putting them into the state of repair required by the covenant.[26]

(*c*) Where a sub-lease contains repairing covenants similar to those in the head lease (with notice thereof to the

[20] If this has not been done the surveyor would have to estimate when each item of dilapidation requiring repair was previously done. The covenantor cannot contend that if he had done the repairs at the proper time the benefit would have been subsequently lost and that the exception clause excuses him; he must fulfil his covenant to repair and at the proper time, irrespective of other events (*Joyner* v. *Weeks*, [1891] 2 Q. B. 31 C. A.). Possibly he is also liable for damages caused by not repairing earlier, see Foa's Land. and Ten. (1907), p. 225.

[21] I.e., "dilapidations caused by the friction of the air, dilapidations caused by exposure," *Terrell* v. *Murray* (45 S. I. 579). Dilapidation arising from extraordinary causes, e.g., tempest, or snow-storm, would not appear to come within the exception.

[22] *Davies* v. *Davies* (38 Ch. D. 505); *Terrell* v. *Murray* (*supra*); Foa, p. 224, Ency. Laws of Eng., vol. vii., p. 669.

[23] *Scales* v. *Lawrence*, 121 R. R. 791.

[24] The soundness of the rule is apparent from the circumstances that were it otherwise a freeholder entitled to a small ground-rent incident to a lease for ten thousand years could harass the lessee with continual actions for repairs.

[25] *Doe d. Worcester Trustees* v. *Rowlands*, 62 R. R. 766; *Conquest* v. *Ebbetts*, [1896] A. C. p. 494.

[26] *Joyner* v. *Weeks*, [1891] 2 Q. B. 31; C. A.; *Ebbetts* v. *Conquest*, [1895] 2 Ch. p. 384, C. A.

sub-lessee), and the sub-lessor sues the sub-lessee for breach of his covenant to repair, the liability of the sub-lessor under his head lease must be taken into account in assessing the damages against the sub-lessee.[27]

The writer hopes that the foregoing attempt to codify the law under discussion may prove useful to lawyers, and also indirectly to surveyors when receiving instructions to schedule dilapidations according to the terms of the lease.

The Court of Appeal, in *Lurcott* v. *Wakely, Proudfoot* v. *Hart,* and *Lister* v. *Lane* (all of which have been referred to, but cases like the last must be rare), has done much to enlighten the task of legal advisers, as also presumably that of surveyors, but it could be wished in dealing with questions concerning repairing covenants that the embarrassing "wear and tear" exception had reached the same tribunal. The writer has stated his notions of the law on that subject with much diffidence. Notwithstanding the advice of eminent and experienced conveyancers[28] this disputatious clause still finds its way into leases, and until it is finally relegated to the limbo of forgotten things it is destined to remain a perpetual cause of perplexity and trouble to all concerned.[29]

WALTER STRACHAN.

THE RECALL OF JUDGES.

WHAT PRESIDENT TAFT THINKS ABOUT IT.

If I sign this joint resolution, I do not see how I can escape responsibility for the judicial recall of the Arizona constitution. The joint resolution admits Arizona with the judicial recall, but requires the submission of the question of its wisdom to the voters. In other words, the resolu-

[27] *Conquest* v. *Ebbetts,* [1896] A. C. 490. Damages for loss to lessor of the premises whilst being repaired are recoverable, see Foa's Land. and Ten. (1907), p. 231; Mayne on Damages (1903), p. 287.

[28] K. & E. Conveyancing (1909), p. 775.

[29] The writer would like to add that in a case within his knowledge the surveyor found no difficulty in acting upon his explanation as expressed, *ante,* though such repairs as had been done had been executed at irregular intervals in a haphazard way. He would have to inquire (1) when each item of the repair ought to have been done according to the lease, (2) when it was actually done, and (3) if not done, it remains to be done, the fact that if it had been done the benefit would not be lost affording no excuse. See *Joyner* v. *Weeks* already cited, *ante.*

tion approves the admission of Arizona with the judicial recall, unless the voters themselves repudiate it. Under the Arizona constitution all elective officers, and this includes county and State Judges, six months after their election, are subject to the recall. It is initiated by a petition signed by electors equal to 25 per cent. of the total number of votes cast for all the candidates for the office at the previous general election. Within five days after the petition is filed, the officer may resign. Whether he does or not, an election ensues in which his name, if he does not resign, is placed on the ballot with that of all other candidates. The petitioners may print on the official ballot 200 words shewing their reasons for recalling the officer, and he is permitted to make defence in the same place in 200 words. If the incumbent receives the highest number of the votes, he continues in his office; if not, he is removed from office and is succeeded by the candidate who does receive the highest number.

This provision of the Arizona constitution, in its application to county and State Judges, seems to me so pernicious in its effect, so destructive of independence in the judiciary, so likely to subject the rights of the individual to the possible tyranny of a popular majority, and, therefore, to be so injurious to the cause of free government, that I must disapprove a constitution containing it. I am not now engaged in performing the office given me in the enabling Act already referred to, approved June 20, 1910, which was that of approving the constitution ratified by the peoples of the Territories. It may be argued from the text of that Act that in giving or withholding the approval under the Act, my only duty is to examine the proposed constitution, and if I find nothing in it inconsistent with the Federal Constitution, the principles of the Declaration of Independence, or the enabling Act, to register my approval. But now I am discharging my constitutional function in respect to the enactment of laws, and my discretion is equal to that of the Houses of Congress. I must therefore withhold my approval from this resolution if in fact I do not approve it as a matter of governmental policy. Of course, a mere difference of opinion as to the wisdom of details in a state constitution ought not to lead me to set up my opinion against that of the people of the Territory. It is to be their government, and while the power of Congress to

withhold or grant statehood is absolute, the people about to constitute a state should generally know better the kind of government and constitution suited to their needs than Congress or the Executive. But when such a constitution contains something so destructive of free government as the judicial recall, it should be disapproved.

A government is for the benefit of all the people. We believe that this benefit is best accomplished by popular government, because in the long run each class of individuals is apt to secure better provision for themselves through their own voice in government than through the altruistic interest of others, however intelligent or philanthropic. The wisdom of ages has taught that no government can exist except in accordance with laws and unless the people under it either obey the laws voluntarily or are made to obey them. In a popular government the laws are made by the people—not by all the people—but by those supposed and declared to be competent for the purpose, as males over 21 years of age, and not by all of these—but by a majority of them only. Now, as the government is for all the people, and is not solely for a majority of them, the majority in exercising control either directly or through its agents is bound to exercise the power for the benefit of the minority as well as the majority. But all have recognized that the majority of a people, unrestrained by law, when aroused and without the sobering effect of deliberation and discussion, may do injustice to the minority or to the individual when the selfish interest of the majority prompts. Hence arises the necessity for a constitution by which the will of the majority shall be permitted to guide the course of the government only under controlling checks that experience has shewn to be necessary to secure for the minority its share of the benefit to the whole people that a popular government is established to bestow. A popular government is not a government of a majority, by a majority, for a majority of the people. It is a government of the whole people, by a majority of the whole people under such rules and checks as will secure a wise, just, and beneficent government for all the people. It is said you can always trust the people to do justice. If that means all the people and they all agree, you can. But ordinarily they do not all agree, and the maxim is interpreted to mean that you can always trust a majority of the people. This is not invariably true; and

every limitation imposed by the people upon the power of the majority in their constitutions is an admission that it is not always true. No honest, clear-headed man, however great a lover of popular government, can deny that the unbridled expression of the majority of a community converted hastily into law or action would sometimes make a government tyrannical and cruel. Constitutions are checks upon the hasty action of the majority. They are the self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority, and of the individual in his relation to other individuals, and in his relation to the whole people in their character as a state or government.

The constitution distributes the functions of government into three branches—the legislative, to make the laws; the executive, to execute them; and the judicial, to decide in cases arising before it the rights of the individual as between him and others and as between him and the government. This division of government into three separate branches has always been regarded as a great security for the maintenance of free institutions, and the security is only firm and assured when the judicial branch is independent and impartial. The executive and legislative branches are representative of the majority of the people which elected them in guiding the course of the government within the limits of the constitution. They must act for the whole people, of course; but they may properly follow, and usually ought to follow, the views of the majority which elected them in respect of the governmental policy best adapted to secure the welfare of the whole people. But the judicial branch of the government is not representative of a majority of the people in any such sense, even if the mode of selecting Judges is by popular election. In a proper sense, Judges are servants of the people; that is, they are doing work which must be done for the government and in the interest of all the people, but it is not work in the doing of which they are to follow the will of the majority except as that is embodied in statutes lawfully enacted according to constitutional limitations. They are not popular representatives. On the contrary, to fill their office properly, they must be independent. They must decide every question which comes before them according to law and justice. If this question is between individuals they will

follow the statute, or the unwritten law if no statute applies, and they take the unwritten law growing out of tradition and custom from previous judicial decisions. If a statute or ordinance affecting a cause before them is not lawfully enacted, because it violates the constitution adopted by the people, then they must ignore the statute and decide the question as if the statute had never been passed. This power is a judicial power, imposed by the people on the Judges by the written constitution. In early days some argued that the obligations of the constitution operated directly on the conscience of the legislature and only in that manner, and that it was to be conclusively presumed that whatever was done by the legislature was constitutional. But such a view did not obtain with our hard-headed, courageous, and far-sighted statesmen and Judges and it was soon settled that it was the duty of Judges in cases properly arising before them to apply the law and so to declare what was the law, and that if what purported to be statutory law was at variance with the fundamental law, *i.e.*, the constitution, the seeming statute was not law at all, was not binding on the Courts, the individuals, or any branch of the Government, and that it was the duty of the Judges so to decide. This power conferred on the judiciary in our form of government is unique in the history of governments, and its operation has attracted and deserved the admiration and commendation of the world. It gives to our judiciary a position higher, stronger, and more responsible than that of the judiciary of any other country, and more effectively secures adherence to the fundamental will of the people.

What I have said has been to little purpose if it has not shewn that Judges to fulfil their functions properly in our popular government, must be more independent than in any other form of government and that need of independence is greatest where the individual is one litigant, and the State, guided by the successful and governing majority, is the other. In order to maintain the rights of the minority and the individual and to preserve our constitutional balance we must have Judges with courage to decide against the majority when justice and law require.

By the recall in the Arizona constitution, it is proposed to give to the majority power to remove arbitrarily, and without delay, any Judge who may have the courage to render an unpopular decision. By the recall, it is proposed

to enable a minority of 25 per cent. of the voters of the district or state, for no prescribed cause, after the Judge has been in office six months, to submit the question of his retention in office to the electorate. The petitioning minority must say on the ballot what they can against him in 200 words, and he must defend as best he can in the same space. Other candidates are permitted to present themselves and have their names printed on the ballot, so that the recall is not based solely on the record or the acts of the Judge, but also on the question whether some other and more popular candidate has been found to unseat him. Could there be a system more ingeniously devised to subject Judges to momentary gusts of popular passion than this? We can not be blind to the fact that often an intelligent and respectable electorate may be so roused upon an issue that it will visit with condemnation the decision of a just Judge, though exactly in accord with the law governing the case, merely because it affects unfavourably their contest. Controversies over elections, labour troubles, racial or religious issues, issues as to the construction or constitutionality of liquor laws, criminal trials of popular or unpopular defendants, the removal of county seats, suits by individuals to maintain their constitutional rights in obstruction of some popular improvement—these and many other cases could be cited in which a majority of a district electorate would be tempted by hasty anger to recall a conscientious Judge if the opportunity were open all the time. No period of delay is interposed for the abatement of popular feeling. The recall is devised to encourage quick action, and to lead the people to strike while the iron is hot. The Judge is treated as the instrument and servant of a majority of the people and subject to their momentary will, not after a long term in which his qualities as a Judge and his character as a man have been subjected to a test of all the varieties of judicial work and duty so as to furnish a proper means of measuring his fitness for continuance in another term. On the instant of an unpopular ruling, while the spirit of protest has not had time to cool and even while an appeal may be pending from his ruling in which he may be sustained, he is to be haled before the electorate as a tribunal, with no judicial hearing, evidence, or defence, and thrown out of office, and disgraced for life because he has failed, in a single decision, it may be, to satisfy the popular

demand. Think of the opportunity such a system would give to unscrupulous political bosses in control, as they have been in control not only of conventions but elections! Think of the enormous power for evil given to the sensational, muckraking portion of the press in rousing prejudice against a just Judge by false charges and insinuations, the effect of which in the short period of an election by recall, it would be impossible for him to meet and offset! Supporters of such a system seem to think that it will work only in the interests of the poor, the humble, the weak and the oppressed; that it will strike down only the Judge who is supposed to favour corporations and be affected by the corrupting influence of the rich. Nothing could be further from the ultimate result. The motive it would offer to unscrupulous combinations to seek to control politics in order to control the Judges is clear. Those would profit by the recall who have the best opportunity of rousing the majority of the people to action on a sudden impulse. Are they likely to be the wisest or the best people in a community? Do they not include those who have money enough to employ the firebrands and slanderers in a community and the stirrers-up of social hate? Would not self-respecting men well hesitate to accept judicial office with such a sword of Damocles hanging over them? What kind of judgments might those on the unpopular side expect from Courts whose Judges must make their decisions under such legalized terrorism? The character of the Judges would deteriorate to that of trimmers and time-servers, and independent judicial action would be a thing of the past. As the possibilities of such a system pass in review, is it too much to characterize it as one which will destroy the judiciary, its standing, and its usefulness?

The argument has been made to justify the judicial recall that it is only carrying out the principle of the election of the Judges by the people. The appointment by the Executive is by the representative of the majority, and so far as future bias is concerned there is no great difference between the appointment and the election of Judges. The independence of the judiciary is secured rather by a fixed term and fixed and irreducible salary. It is true that when the term of Judges is for a limited number of years and re-election is necessary, it has been thought and charged sometimes that shortly before election in cases in which popular

interest is excited, Judges have leaned in their decisions toward the popular side.

As already pointed out, however, in the election of Judges for a long and fixed term of years, the fear of unpopular prejudice as a motive for unjust decisions is minimized by the tenure on the one hand, while the opportunity which the people have, calmly to consider the work of a Judge for a full term of years in deciding as to his re-election, generally insures from them a fair and reasonable consideration of his qualities as a Judge. While, therefore, there have been elected Judges who have bowed before unjust popular prejudice, or who have yielded to the power of political bosses in their decisions, I am convinced that these are exceptional, and that, on the whole, elected Judges have made a great American judiciary. But the success of an elective judiciary certainly furnishes no reason for so changing the system as to take away the very safeguards which have made it successful.

Attempt is made to defend the principle of judicial recall by reference to states in which Judges are said to have shewn themselves to be under corrupt corporate influence and in which it is claimed that nothing but a desperate remedy will suffice. If the political control in such States is sufficiently wrested from corrupting corporations to permit the enactment of a radical constitutional amendment like that of judicial recall, it would seem possible to make provision in its stead for an effective remedy by impeachment in which the cumbrous features of the present remedy might be avoided, but the opportunity for judicial hearing and defence before an impartial tribunal might be retained. Real reforms are not to be effected by patent shortcuts or by abolishing those requirements which the experience of ages has shewn to be essential in dealing justly with everyone. Such innovations are certain in the long run to plague the inventor or first user and will come readily to the hand of the enemies and corruptors of society after the passing of the just popular indignation that prompted their adoption.

Again judicial recall is advocated on the ground that it will bring the Judges more into sympathy with the popular will and the progress of ideas among the people. It is said that now Judges are out of touch with the movement toward a wider democracy and a greater control of govern-

mental agencies in the interest and for the benefit of the people. The righteous and just course for a Judge to pursue is ordinarily fixed by statute or clear principles of law, and the cases in which his judgment may be affected by his political, economic, or social views are infrequent. But even in such cases, Judges are not removed from the people's influence. Surround the judiciary with all the safeguards possible, create Judges by appointment, make their tenure for life, forbid diminution of salary during their term, and still it is impossible to prevent the influence of popular opinion from colouring judgments in the long run. Judges are men, intelligent, sympathetic men, patriotic men, and in those fields of the law in which the personal equation unavoidably plays a part, there will be found a response to sober popular opinion as it changes to meet the exigency of social, political and economical changes. Indeed this should be so. Individual instances of a hidebound and retrograde conservatism on the part of Courts in decisions which turn on the individual economic or sociological views of the Judges may be pointed out; but they are not many, and do not call for radical action. In treating of Courts we are dealing with a human machine, liable like all the inventions of man to err, but we are dealing with a human institution that likens itself to a divine institution because it seeks and preserves justice. It has been the corner-stone of our gloriously free government in which the rights of the individual and of the minority have been preserved, whilst governmental action of the majority has lost nothing of beneficial progress, efficacy, and directness. This balance was planned in the constitution by its framers and has been maintained by our independent judiciary.

Precedents are cited from State constitutions said to be equivalent to a popular recall. In some, Judges are removable by a vote of both houses of the legislature. This is a mere adoption of the English address of Parliament to the Crown for the removal of Judges. It is similar to impeachment in that a form of hearing is always granted. Such a provision forms no precedent for a popular recall without adequate hearing and defence, and with new candidates to contest the election.

It is said the recall will be rarely used. If so, it will be rarely needed. Then why adopt a system so full of danger? But it is a mistake to suppose that such a powerful lever for

influencing judicial decisions and such an opportunity for vengeance because of adverse ones will be allowed to remain unused.

But it is said that the people of Arizona are to become an independent State when created, and even if we strike out judicial recall now, they can reincorporate it in their constitution after statehood.

To this I would answer that in dealing with the Courts, which are the corner-stone of good government, and in which not only the voters, but the non-voters and non-residents, have a deep interest as a security for their rights of life, liberty, and property, no matter what the future action of the State may be, it is necessary for the authority which is primarily responsible for its creation to assert in no doubtful tones the necessity for an independent and untrammeled judiciary.

EXPENSES OF PARTY WALLS.

Questions respecting party walls do not frequently arise in practice, but when they do they are apt to be difficult. The term "party wall" as Fry, J., observed in *Watson* v. *Gray* (14 Ch. D. p. 194), is rather popular than legal, and it appears to denote a wall separating adjoining premises and serving for support to both. But the nature of the legal interest of each owner in the wall may vary. Ordinarily the wall belongs to the two adjoining owners as tenants in common. It is usually difficult to ascertain the exact boundary line between the two properties, though, if it passed along the centre of the wall one half of the wall might belong exclusively to one owner and the other half to the other owner. All that can with certainty be said is that the wall divides the two properties and that it is in fact used in common. The reasonable assumption is that the two owners of the premises originally agreed to hold the site of the wall in common, and upon this assumption is based the rule that a party wall is *prima facie* held on a tenancy in common. In *Cubitt* v. *Porter* (8 B. & C. p. 263), Bayley, J., in considering the various ways in which the ownership of the wall might be divided, said: "If the land on which the wall was built belonged on

one side to one party, and on the other to the other party, and they between them agreed to build the wall, it would have been prudent at least to make this bargain that so long as there was to be a wall continuing on this property, the land on which it was built and the wall which stood on the land, should be taken and considered to be the common property of the two, and that the owners of the estates on each side should be tenants in common of the undivided moiety of that land and of the wall: with the power of adopting such remedies for partition as tenants in common may adopt." Apparently this should have run "tenant in common of that land and of the wall in undivided moieties," and the learned Judge held that the ordinary assumption ought to be that this agreement had been made. Similarly Holroyd, J., said: "The presumption arising from the acts of enjoyment is that the wall was the property of the plaintiff and defendant as tenants in common."

Fry, J., in *Watson* v. *Gray* (*supra*), adopted this as the common and primary meaning of the term "party wall" though he pointed out various modifications of the proprietary rights in it. It may also signify a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners; or it may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements, or the term may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross-easement in favour of the owner of the other moiety. Whether any of these latter cases represent the real interests of the two owners respectively will depend on the circumstances attending the building and user of the wall. But where no evidence on the matter is available then the *prima facie* rule applies and the wall is held by the adjoining owners as tenants in common in undivided moieties.

For practical purposes questions as to party walls usually arise when expense has to be incurred in repairs or improvement, and an interesting example is contained in the recent case of *Mason* v. *Fulham Corporation* (1910, 1 K. B. 631), where the provisions of the London Building Act, 1894, on the subject had to be applied. Section 5 (16) of that act defines a "party wall" as "a wall forming part of a building and used or constructed to be used for separa-

tion of adjoining buildings belonging to different owners." There is more in the definition but this is sufficient to shew that the Act in using the term does not purport to fix the precise legal relation of the owners, but only to denote that the wall is in fact used for separation. Part VIII., (sections 87-101), regulates the rights of adjoining owners, and section 95 provides how expenses of repairing, or of raising or underpinning a party wall, are to be borne. The owner who does the work is called the building owner; the other is called the adjoining owner. The cost of repair is borne by the two owners jointly in proportion to the use which each makes of the wall. Usually they will make equal use of it. The cost of raising or underpinning is borne, in the first instance by the building owner, but section 95 provides in the concluding part that if at any time the adjoining owner makes use of the party wall which has been raised or underpinned beyond the use thereof made by him before the alteration, he is to bear a due proportion of the expenses having regard to the use that he may make thereof, and section 99 provides that "where the adjoining owner is liable to contribute to the expense of building any party structure then, until such contribution is paid the building owner at whose expense the same was built shall stand possessed of the sole property in the structure."

In cases where there is no change in the ownership of premises of the building owner between the time when the expense of raising a party wall are incurred and the time when the adjoining owner desires to make additional use of it, and so becomes liable to pay a portion of the expenses, there is no doubt as to the manner in which these provisions apply. But where the building owner has in the interval disposed of the premises, the question arises whether the portion of the expenses payable by the adjoining owner is to be paid to the original building owner or to his successor in title. There is some reason for saying that the original building owner should be the recipient. The expenses have been borne by him and it is unlikely that he will have sold the house at an enhanced price on the chance of a part of the expenses being recouped while if his successor receives the money it is an unearned and unexpected increment. But the question has of course to be determined in accordance with the provisions of the statute so far as they afford any guidance.

In *Mason* v. *Fulham Corporation* (*supra*), the premises of the plaintiff who was building owner, adjoined premises of the Fulham free library. In 1895 he was desirous of rebuilding a party wall between his stabling and the library garden, and of raising it from the height of ten feet to forty feet. Notice was given under the London Building Act, 1894, to the library commissioners of his intention to do this work, and by an agreement of the 21st of May, 1895, it was agreed that the commissioners should have the right at any time thereafter to use the party wall on paying one half of the cost as certified by their surveyor. The cost was certified at £111, 9s. In 1896 the plaintiff conveyed his house to Slater without any assignment of the benefit of the agreement, and in 1899 Slater conveyed to Sir E. Galsworthy. In 1908 the library commissioners were desirous of using the party wall and paid to Sir E. Galsworthy as the then building owner one-half the cost of its erection. The plaintiff thereupon claimed against them payment of the amount to himself under the terms of the agreement of the 21st May, 1895, but the Divisional Court affirming the judgment of the Judge of the Brompton County Court held that the claim could not be sustained.

The Divisional Court considered in accordance with the cases referred to above, that the plaintiff and defendants were, at the time the party wall was raised, tenants in common of the wall, and that it was this tenancy in common which passed to the successive owners of the premises of the building owner. But the only indication as to who is entitled to receive the payment seems to be contained in section 99 of the Act quoted above, which refers to "the building owner at whose expense" the party wall was built. The section does not say expressly that the payment is to be made to him but it makes him the sole owner of the wall until the share of expense is paid and gives him this sole ownership as a security for the money should it ever become payable. To have the benefit of this security he must continue to be the owner. On the other hand if he conveys the property his successor cannot properly be described as "the building owner at whose expense" the wall was built. It seems that the draftsman of the section did not contemplate the case of a change of ownership but the Court held that the section must be taken to refer to the

owner for the time being. "The words 'the building owner at whose expense the same was built' must, said Phillimore, J., "be taken to mean the person who at the material time happens to be the owner of the plot, whether there has in the interval been a change of ownership or not. It is only reasonable to assume that the rights of the building owner pass with the assignment of the property." This seems to be the more convenient view, and as the learned Judge pointed out, the building owner can, if he thinks the contingent right to contribution has any substantial value, reserve the benefit of it to himself unless the purchaser will pay for it. If no such reservation is made then the purchaser takes it as an incident of his ownership.

BILLS AND NOTES OF CORPORATIONS.

It is believed that some uncertainty prevails at the present moment in the commercial world as to the form in which directors and officers of companies under the Companies Acts and other corporations should sign bills of exchange, promissory notes, and cheques of the corporation so as to avoid incurring personal liability. From time to time the question of the personal liability of directors on negotiable instruments intended to bind the company only, has cropped up, but in nearly all of the reported cases the negotiable instrument has been a promissory note. The most common form of what are ordinarily known as negotiable instruments is the cheque (though this, in fact, is often made "non-negotiable,") and the same principles with respect to the liability of the persons signing them apply to cheques and bills of exchange as to promissory notes. The latest case of authority on the subject appears to be *Chapman* v. *Smethurst*, in the Court of Appeal (1909, 1 K. B. 73, 927), and this had to do with a promissory note. No similar case appears to be reported since 1871, when *Dutton* v. *Marsh* (L. R. 6 Q. B. 361), was decided, also relating to a promissory note. This case was decided before the Judicature Act came into operation.

There are two statutory enactments to be considered, section 26 of the Bills of Exchange Act, 1882, and section 77 of the Companies (Consolidation) Act, 1908. Section

26 of the Bills of Exchange Act is as follows; "(1) Where a person signs a bill as drawer, indorser or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability. . . . ." Section 77 of the Companies Act (corresponding with section 47 of the Companies Act, 1862), is as follows: "A bill of exchange or promissory note shall deem to have been made, accepted, or indorsed on behalf of a company if made, accepted, or indorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority."

Among the reported cases two may be taken as typical, in one of which the corporation (a company under the old Joint Stock Companies Acts) was held liable, and not the directors; and in the other (a limited company under the Act of 1862), the directors were held liable, the negotiable instrument in each case being a promissory note. The first case — where the directors were held not to be personally liable—is *Aggs* v. *Nicholson* (1856, 1 H. & N. 165). There the promissory note ran: " . . . we, two of the directors of the Ark Life Assurance Society, by and on behalf of the said society, do hereby promise to pay," &c. The plea of declaration (the case being prior to the Judicature Acts), contained an allegation that the defendants signed the promissory note "on behalf of the said company, and not with the view or intention of binding themselves, or either of them, personally to pay the said note." This plea was demurred to, and the case is reported on the argument of the demurrer in the Court of Exchequer. Judgment was given for the defendant, on the ground that the words used "purport to bind the company and not the parties signing." It will be noticed that the words used were "on behalf of," the very words that occur in section 26 of the Bills of Exchange Act, 1882.

The other case in which the directors were held personally liable, is *Dutton* v. *Marsh* (*supra*). The promissory note ran: " . . . we, the directors of the company, do promise to pay," &c. In a corner of the document the company's seal was affixed. The case went to trial in the usual way, the defendants simply pleading that they did

not make the note, and a verdict was entered for the plaintiff. A rule was obtained to enter a verdict for the defendants, on the ground that they were not personally liable, and this rule the Court of Queen's Bench discharged. Cockburn, C.J., in delivering the judgment of the Court, intimated that the only difficulty was caused by the corporate seal being affixed, but this was not equivalent to a declaration that the document was signed on behalf of the company only: "If . . . it had simply stated that the defendants, described as directors, but without saying signed 'on behalf of the company,' signed the promissory note, it is clear they would have been personally liable." The case was, therefore, decided on this footing, and the defendants, the directors, were held liable. It will be noticed that this decision also is in absolute accordance with the rule expressly enacted in sec. 26 of the Bills of Exchange Act, 1882, and is in fact distinctly grounded upon that very rule. Both *Aggs* v. *Nicholson* and *Dutton* v. *Marsh*, then, were decided with reference to the ordinary law of negotiable instruments, and not specially with reference to company law.

Now, the only substantial difference between *Aggs* v. *Nicholson* and *Dutton* v. *Marsh*, is that in the former case the words "on behalf of" the company were used in the promissory note, and in the latter case they were not. In both cases the payee did, as a matter of fact, deal with the company and with the directors merely as representing the company. Only, however, in *Aggs* v. *Nicholson* was advantage taken of this on the pleadings and it seems possible that had all the facts been pleaded in *Dutton* v. *Marsh*—as they were in *Aggs* v. *Nicholson*—the result of the case in the Queen's Bench might have been different. On this, point there is an Australian case which is very instructive—*Hoskins* v. *Thomson* (1893, 14 N. S. W. R. 323). This case like *Aggs v. Nicholson* and *Dutton* v. *Marsh*, was decided under the Common Law Procedure Acts (following the English Acts of 1852 and 1854), and still in force in New South Wales. Moreover, sec. 26 of the Bills of Exchange Act, 1882, was taken over by the New South Wales Act of 1887, *totidem verbis*. The circumstances and facts in *Hoskins* v. *Thomson* resemble those in *Dutton* v. *Marsh*, whilst the pleadings rather resemble the pleadings in *Aggs* v. *Nicholson*. Promissory notes had been mad-

in favour of the plaintiffs, and were signed by the two defendants (who were in fact, directors of a company) and the secretary of the company, the name of the company being written above these signatures, and the seal of the company being affixed beneath. The defendants set out in one plea, as a defence upon equitable grounds, the facts of the case, much as was done in *Aggs* v. *Nicholson*, and alleged that the promissory notes were "signed and made for and on behalf of the said company," and were "intended by the plaintiffs, and by the defendants, to be the promissory notes of, and to bind only, the said company," and were in their actual form "through a mistake of the defendants and of the plaintiffs." To this plea the plaintiffs demurred. The Court gave judgment for the defendants on this demurrer, and held that the plea demurred to was a good defence to the action upon equitable grounds, since the promissory notes were intended by both defendants and plaintiffs to bind the company only, and were made as they stood—*i.e.*, the words "for and on behalf of the company" were omitted—by a mutual mistake. After a reference to the relevant section (sec. 26) of the Bills of Exchange Act, the judgment proceeds: "At law, no doubt, these defendants are liable on the notes, but if there has been a mutual mistake, and that is admitted upon these pleadings, the Court of Equity will intervene to prevent one party taking advantage of that mistake."

Dutton v. *Marsh* was decided (as already observed), by a Court of common law before the Judicature Acts—that is under the same system of pleading as the Australian case. No equitable or other special plea having been put in, the decision in favour of the plaintiffs, saddling the directors with personal liability, is hardly to be wondered at. The recent case of *Chapman* v. *Smethurst* (*supra*), is really an illustration of the effect of pleadings such as were put in in *Aggs* v. *Nicholson* and *Hoskins* v. *Thomson*, disguised under the modern procedure introduced by the Judicature Acts.

In *Chapman* v. *Smethurst* the promissory note was signed by the defendant, the name of the company appearing above the defendant's name, and the words "managing director" following his name, the company's name and "managing director" being impressed by a rubber stamp. The promissory note also ran: " . . . I promise to pay, etc. Channell, J., laid some stress on this last circum-

stance, and held the defendant personally liable. This decision, however, was reversed by the Court of Appeal, and judgment was entered for the defendant. The decision constitutes an important landmark in the law relating to the signature of a corporation's negotiable instruments by its officers. Next to nothing is said about sec. 26, or any other section of the Bills of Exchange Act, 1882. On the other hand sec. 47 of the Companies Act, 1862 (now replaced by sec. 77 of the Act of 1908), was considered, though this had not been done in the previous cases already referred to. The only question, in fact, dealt with in the judgments delivered was whether the company was bound by virtue of the provisions of the Companies Act, and the question whether the requirements of the Bills of Exchange Act had been complied with was passed over altogether. Vaughan Williams, L.J., said: "It is true that in the present case the promissory note does not profess to be signed 'for' or 'on account of' the company, but we have that which is equally strong to shew that the company intended to be bound by the note, that is the stamped signature of the company at the foot of the note and placed over the written signature of the defendant;" "it seems impossible to say that the defendant is personally liable merely because he placed the signature 'J. H. Smethurst, managing director,' under the words which indicated that the note was made on behalf of the company." These two passages contain the gist of the decision in the case, and the effect of the decision seems to be that, where the personal liability of officers as a corporation is in question, the intention as gathered from the form of the document is the only thing to be considered, irrespective of the precise words of sec. 26 of the Bills of Exchange Act.

On closer consideration, this *ratio decidendi* appears to be in exact accord with the spirit of the Judicature Acts, and the result is reached at one bound, instead of first having to admit that at law the defendant would be liable—in virtue of the words of the Bills of Exchange Act section—and then falling back on equity to correct the harsh conclusion of law. This was the process actually adopted in *Hoskins* v. *Thomson* (*supra*), and was also virtually adopted in *Aggs* v. *Nicholson* (*supra*). The Court in *Chapman* v. *Smethurst* were able, under the modern procedure, to go straight to the question of the intention of the par-

ties, notwithstanding that there were no formal pleadings.

All the cases mentioned above were concerned with promissory notes. *Chapman* v. *Smethurst,* however, covers the case of cheques as well, having regard to the manner in which many corporations' cheques are signed. The usual method of signing the cheques of an ordinary limited trading company is for the name of the company to be stamped or printed at the foot of the cheque, and for the directors, secretary, etc., to write their own names alongside of or underneath the name of the company. It is not common to see any such words as "for" or "on behalf of" inserted. This method was that which was precisely adopted in the case of the promissory note in *Chapman v. Smethurst.* The decision, therefore, is of considerable practical importance on the question of cheques also, as indicating that the ordinary practice adopted in signing cheques of a company is the safe and proper one so far as the directors of the company are concerned. A cheque is merely a particular kind of bill of exchange (sec. 73 of the Bills of Exchange Act). The drawer of a cheque, therefore, by sec. 55, engages that it shall be paid and the holder compensated for non-payment; by sec. 56, a person signing a cheque otherwise than as a drawer may incur the liabilities of an indorser. These risks can only be effectually guarded against in the case of directors by such a method of signature as shall place the question of intention not to be personally liable beyond a doubt.

ACCORD AND SATISFACTION.

As long ago as 1718 in the case of *Cumber* v. *Wane* the rule was laid down by Pratt, C.J., that a debt was not satisfied by the receipt of a security of equal degree for a smaller sum, if it afforded no easier or better remedy. Although the doctrine laid down in that case has not been sustained to its full extent, the main principle—that an agreement to accept a smaller sum in lieu of an ascertained debt of larger amount is *nudum pactum*—has since been often affirmed. The doctrine, as shewn in Lord Selborne's judgment in *Foakes* v. *Beer,* 9 A. C. 605, really dates back to Pinnel's case in 1602, where it was laid down by all the

Judges of the Common Pleas. In the modern case just mentioned a direct attempt was made to overthrow the authority of *Cumber* v. *Wane*; but the House of Lords affirmed its validity, Lord Blackburn, however, expressing the regret which he felt in being compelled to concur in the judgment.

The ingenuity of the law has been equal to establishing fine distinctions in order to do substantial justice; and a liberal construction has been given to the principle that where any benefit or even any legal possibility of benefit to the creditor accompanies the payment of the smaller sum accepted by him in satisfaction, such addition will make the consideration sufficient to uphold the agreement. One of the exceptions grafted upon the rule has been the satisfaction of a claim by payment of a smaller sum by a third person; and an interesting example of the legal position thus created is afforded by a case just decided by the Court of Appeal, *Hirachund Punamchand* v. *Temple*, 1911, 2 K. B. 330.

The plaintiffs, who were money-lenders, sued upon a promissory note for 1,500 rupees after giving credit for Rs. 650 under the following circumstances. They had advanced money to the defendant, a lieutenant stationed at the time of the loan at Jubbulpore in India, and at his request applied to his father Sir Richard Temple in England for payment. Correspondence took place, from which it appeared that the plaintiffs claimed 3,000 rupees with interest at two per cent. per month on a bond, and 1,500 rupees with interest at the same rate upon the promissory note. After making an offer for payment in respect of the amount secured by the bond, Sir Richard Temple's solicitors continued: "As to the promissory note for Rs. 1,500, dated November 27, 1908, Sir Richard Temple has only now ascertained that his son only received Rs. 500 in respect of this . . . Our instructions are, therefore, to pay you Rs. 500 in respect of principal and Rs. 150 in respect of one year's interest, making together Rs. 650. We enclose draft by the National Bank of India on the Bank of Bombay, Poona, in your favour for this amount, and shall be glad to receive the promissory note in exchange." To this one of the plaintiffs' firm replied acknowledging the receipt of the draft, and adding, "In the meantime I cash the draft and place the amount in account. I wish you to think over; I

have proofs to prove. I see now that Lieutenant R. D. Temple does not remember what he actually received from me. Kindly remit me the balance early." The correspondence relating to the debt secured by the bond was practically to the same effect, and a draft for Rs. 750 was sent in respect of it. The plaintiffs cashed the two drafts, and gave credit for Rs. 650 in their claim in the present action. Scrutton, J., held that the facts afforded no defence to the action against the defendant, and gave judgment for the amount claimed.

The Court of Appeal (Vaughan Williams, Fletcher Moulton and Farwell, L.JJ.), reversed this finding. The Lord Justices arrived at their conclusion by different reasoning. Vaughan Williams, L.J., was inclined to agree with Scrutton, J., that *primâ facie* an accord and satisfaction must be by an agreement made between a person under obligation to another person and that other person. His view was that the inference should be drawn in the present case that the plaintiffs who kept and cashed the draft agreed to accept it on the terms upon which it was sent. The plaintiffs then would have ceased really to be holders of the negotiable instrument on which they sued. Alternatively, if the promissory note in their hands did not cease to be a negotiable instrument, then from the moment Sir. R. Temple's draft was cashed, a trust was created, so that any money the plaintiffs might receive upon the promissory note would be held in trust for him; and under the circumstances disclosed by the correspondence, it was impossible to suppose that the father wished to insist on payment of the note by the son. Vaughan Williams, L.J., although founding his judgment on these reasons, did not wish to be understood as negativing the proposition that a defence might also be set up on the grounds indicated by Willes, J., in *Cook* v. *Lister,* 13 C. B. N. S. 543, upon which the other Lord Justices based their decision.

Fletcher Moulton, L.J., considered it clear from the correspondence, no oral testimony having been given at the trial, that the plaintiffs took the money of the father with full knowledge that it was sent in full settlement of the claim. They could therefore only accept it honestly on the terms upon which it was offered; he declined to assume that they dishonestly possessed themselves of the money. Those being the facts, he agreed with the view expressed by Willes,

J., in the case above cited. The legal position might be that it would be an abuse of the process of the Court to allow the creditor to sue; or preferably, that there was an extinction of the debt. "If a third person steps in and gives a consideration for the discharge of the debtor," said the Lord Justice, "it does not matter whether he does it in meal or in malt, or what proportion the amount given bears to the amount of the debt." Farwell, L.J., thought that, assuming an accord and satisfaction must be by agreement between the debtor and creditor, the facts in the present case might be treated as a tripartite agreement between the father, the son, and the creditors. He agreed also that the plaintiffs could not be heard to say that they had acted dishonestly when an honest construction could be put upon their conduct by treating their acceptance and retention of the money upon the terms on which it was offered. He also had no doubt that a Court of Equity would have regarded the plaintiffs as disentitled to sue except as trustees for the father, and so would have restrained them under the circumstances existing in the present case.

There can be no doubt that substantial justice has been done by the decision; but it almost seems a pity that a venerable but inequitable doctrine has become so established that its injustice can be evaded only by the continuous exercise of judicial subtlety. The prospect of immediate payment of a sum less than the amount actually due from a doubtful debtor is usually accepted with eagerness in most cases as a very real consideration in fact; it is not so regarded in law, although that result can be successfully accomplished if the creditor received actually the same sum not from the debtor himself, but from a friend of the debtor in discharge of the debt. The learned editors of Smith's Leading Cases observe upon the leading case in this connection that its doctrine is founded upon vicious reasoning and false views of the office of a Court of law, which should rather strive to give effect to the engagements which persons have thought proper to enter into, than cast about for subtle reasons and defeat them upon the ground of being unreasonable. "Carried to its full extent, the doctrine of *Cumber* v. *Wane* embraces the exploded notion that in order to render valid a contract not under seal, the adequacy as well as the existence of the consideration must be established."

FRAUD AS AVOIDING INSTRUMENTS.

It was, until very recently, well settled law that a document, the signature whereto has been obtained by fraud, does not, in the absence of negligence, bind the signer. The principle dates back to the time when ability to read was the exception, and a writing had consequently to be read over and explained to the parties before signature. In one of the earliest authorities on the point, Thoroughgood's Case (2 Co. Rep. 9 A), it was held that if an illiterate man executes a deed which has been falsely read over to him, or of which the sense has been declared different from the truth, that parchment is nevertheless not his deed. But the doctrine was extended in course of time to cover the case of persons able to read. In *Vorley* v. *Cook* (1 Giff. 230) a solicitor induced a lettered client to execute a mortgage to him to secure a pretended debt by representing that it was only a deed of covenant for the production of deeds. It was held that the deed was no more a genuine one than if the signature had been forged. The view was also taken in early days that the doctrine was not confined to deeds only, but was equally applicable to other written contracts.

Foster v. *Mackinnon* (4 C. P. 704), a well-known case on this branch of the law, recognized that the doctrine applied equally to literates and illiterates, to deeds and to other written instruments, with a limitation in the case of negotiable instruments. The plaintiff in that case was the *bonâ fide* holder of a bill of exchange and the defendant was an indorser. It appeared in evidence that the signature of the defendant, a very old man, was obtained by a false representation, made to him by one in whom he reposed confidence, that what he was signing was a guarantee only, and the defendant signed believing this statement and not knowing that the document was in reality a bill of exchange. The Court of Common Pleas held that it was clear on principle and on authority that if a blind man, or a man who cannot read, or who for some reason not implying negligence, forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate signs, then, if there be no negligence,

the signature so obtained is of no force. And on the same reasoning if a deed be delivered or a writing signed in which a blank is left and which is afterwards improperly filled up, without negligence on the part of the one executing or signing, the deed or writing is void. Thus in *Swan* v. *North British Australasian Company* (32 L. J. Rep. Ex. 273), where a person who owned shares in two companies executed a transfer in blank and gave the broker authority to fill it up with shares in one company and the broker filled it up with shares in the other company which were afterwards transferred to an innocent purchaser, the Court said the whole thing was a forgery, and the transfer not binding on the grantor. The ground for the invalidity of the deed or document in such cases was two-fold, fraud and the fact that the mind of the signer did not accompany his signature, and, therefore, in contemplation of law that he never did sign the contract to which his name was appended.

But it was stated in *Foster* v. *Mackinnon*, that different considerations apply in the case of negotiable instruments. Such are not only assignable, but form part of the currency of the country, and a qualification of the general rule is necessary to protect innocent transferees for value. Therefore, if a man writes his name across the back of a blank bill stamp and parts with it, and the paper is afterwards improperly filled up, he is liable as indorser to a holder in due course to the extent of any sum which the stamp will cover. This, however, was not the case with Mackinnon. He never intended to indorse a bill of exchange at all, but to sign a contract of an entirely different nature. It was not his design, and, if he was guilty of no negligence, it was not even his fault, that the instrument he signed turned out to be a bill of exchange. He was deceived as to the contents of the instrument, and therefore, he was not bound by his signature.

The question of negligence raises obvious difficulties. In *Hunter* v. *Walters* (7 Ch. App. 87), a solicitor, wishing to get hold of some deeds, falsely represented to his client, the mortgagee, that the property was to be sold and induced him, "as a mere matter of form," for the purpose of facilitating the transaction, to execute a conveyance of the property to him (the solicitor), and to sign a receipt for the purchase-money, though in fact no money passed. The solicitor afterwards deposited the deeds as security for his

own liabilities, the creditor having no notice that the solicitor was not the beneficial owner. The mortgagee, in claiming that his mortgage should have priority over the subsequent charge, relied on *Foster* v. *Mackinnon,* and contended that as his mind was not directed to the meaning of the deed which was represented to be of a totally different character from what it turned out to be, the deed was, therefore, void. But Lord Hatherley held that there was a limit to the plea of misrepresentation as to the character of the deed, and that the deed in the present case was not of a character so wholly different from that which it was represented to be as to be absolutely void. He further said that a man who executes a solemn instrument by which he conveys an interest, and signs on the back of that instrument a receipt for the purchase-money, cannot affect not to know what he was doing, and that it was not enough to say he thought it was only a matter of form. And Lord Justice James said, that it was a doubtful question whether, if there be a false representation respecting the contents—and an educated person might by simple means have satisfied himself as to what the contents were—he may not by executing it negligently be estopped as between himself and a person who innocently acts upon the faith of the deed being a valid one, and obtains an estate through it. In these dicta we see disapproval of the rule which was originally established in favour of the illiterate being extended to cover the case of educated persons.

This disapproval was repeated in *Howatson* v. *Webb* (1908, 1 Ch. 3). In that case A., a solicitor engaged in certain building speculations, took leases of building plots in the name of his managing clerk, the defendant. Some time afterwards A. asked his clerk to transfer the leases, and placed before him some documents purporting to be transfers, but being in reality mortgages of the property, and containing personal covenants by the mortgagor (the clerk) to pay the mortgage debts. The clerk signed the deeds without troubling to read them, and was subsequently sued upon his covenant by a transferee of the mortgage debt. He pleaded that his mind was never directed to the true nature of the deed, and that there was sufficient misrepresentation to support the plea of *non est factum,* but to no purpose. Lord Justice Farwell's words are worth quoting: "If a man knows that the deed is one purporting to deal

with his property, and he executes it, it will not be sufficient for him to shew, in order to support a plea of *non est factum*, that a misrepresentation was made as to the contents of the deed. The deed in the present case is not of a character so wholly different from that which it was represented to be, as to come within the principle within which Lord Hatherley held that *Hunter* v. *Walters* did not fall. I think that the question will some day have to be determined whether all the old cases, as to representation of the contents of a deed, were not based on the illiterate character of the person to whom the deed was read over, and on the fact that an illiterate man was treated as being for this purpose in the same position as a blind man, and whether at the present time an educated man, who is not blind, is not estopped from availing himself of the plea of *non est factum* against a person who innocently acts on the faith of the deed being valid."

But the latest case on the subject, *Carlisle, etc., Banking Co.* v. *Bragg* (1911, 1 K. B. 489), introduces a change of judicial opinion, since it confirms the rule that the plea of *non est factum* is applicable both to literate and illiterate persons, and throws grave doubt on the theory that such plea is rebutted by evidence of negligence. In that case the defendant signed a guarantee to the bank to secure an overdraft of one of their customers, not knowing it was a guarantee, but believing a representation made to him by the customer that the document was merely an insurance paper. He did not, therefore, trouble to read it. Now following *Hunter* v. *Walters* and *Howatson* v. *Webb* it would seem that the defendant was put out of Court by his negligence. He was an educated man, he had an opportunity of seeing and asking the meaning of the document he signed, and that he did not do so was, it would appear, sufficient evidence of laches to undo him. But the Court of Appeal took another view, and held that having been materially misled as to the contents of the document he was not bound. Buckley, L.J., said: "his mind does not go with his pen, and the deed is not his deed. In general the proposition is true that if a man, acquainting himself with the contents of the deed by ear and being told by another what it contains, receives false information as to its contents in a material respect, that is not his deed . . . I do not think that cases of this kind are to be confined to the blind and the illiterate."

Is then *Foster* v. *Mackinnon* an unsafe guide at the present time so far as regards negotiable instruments? On the supposition that the endorser or acceptor of a negotiable instrument owes a duty to anyone into whose hands it rightly gets not to be negligent, and is thus estopped from disputing the validity of his signature, that decision may be sound. But *Schofield* v. *Earl of Londesborough* (1896, A. C. 574), negatives such idea of duty, for, in that case, it will be remembered, the defendant was regarded as being under no duty so to fill up a bill as to prevent the possibility of fraudulent alteration after it has left his hands.

We can at present say this much at any rate, that in the case of instruments, not being negotiable, if a man executes a document carelessly, without troubling to enquire its effect, he is bound by his signature, but if he executes it on the faith of a false representation as to its contents, then he is not so bound. If the instrument is a negotiable one, *Foster* v. *Mackinnon* and *Schofield* v. *Londesborough* would seem to be in conflict, and a clear and authoritative ruling on the point is much wanted, but we should be disposed to think that the above rule obtains.

MOTOR ACCIDENTS.

The opinion has been recently expressed (see *Marshall* v. *Gowans*, 20 O. W. R. 37), that 8 Edw. VII., ch. 53 (which provides that when an accident has occurred by reason of a motor on the highway, the motorist is compelled to shew that he was not negligent), is rather hard upon the motorist because, as is said, he is called upon to bear the burden of proving a negative. It is respectfully submitted this is not correct. Negligence is not an affirmative fact and non-negligence is not a negative fact. When the defendant is required to prove that he was not negligent, he is merely required to prove certain affirmative facts within his own knowledge. The burden of shewing negligence in other negligence cases is on the plaintiff. And the plaintiff shews negligence by proving (as best he can) a negative. Thus for instance, the plaintiff proves that the bell was not rung and the whistle was not blown. Only when the plaintiff has given evidence of these negative facts is the defendant

called upon to prove the affirmative. The act in question requires the defendant to prove, first the affirmative facts which shew that he was not negligent. The plaintiff is still left to prove the negative. Before the Act it was assumed that the motorist was not negligent; now it is assumed that he was. The plaintiff proves that the accident occurred because of the motor. Then the motorist must prove that he took the precautions referred to in the Act. This is affirmative. The plaintiff proves that the precautions were not taken. This is proof of a negative. Therefore it is still the plaintiff and not the motorist, who must prove a negative.

London, Ont. T. H. LUSCOMBE.

AN IMPERIAL SCHOOL OF LAW.

BY MR. WALTER G. HART, LL.D. (LONDON).

No lawyer needs to be told that England once possessed a great national school of law. In the fifteenth century Sir John Fortescue could write of the Inns of Court and Chancery: "Here in term time the students of the law attend in great numbers as it were to public schools, and are there instructed in all sorts of law learning and the practice of the Courts." A little more than a century after this, Coke could say, "For the young student which most commonly cometh from one of the universities, for his entrance or beginning, were first instituted and created eight houses of Chancery to learn there the elements of the law, that is to say, Clifford's Inn, Lyon's Inn, Clement's Inn, Barnard's Inn, Staples Inn, Furnival's Inn, Thavie's Inn, and New Inn, and each of these houses consists of forty or thereabouts; for the readers, utter-barristers, mootmen, and inferior students are famous and renowned colleges or houses of Court called the Inner Temple, to which the first three houses of Chancery appertain; Gray's Inn, to which the next two belong; Lincoln's Inn which enjoyeth the last two but one; and the Middle Temple, which hath only the last. Each of the houses of Court consists of readers above twenty; of utter-barristers above thrice so many; of young gentlemen, about eight or nine score where they spend their

time in study of law and in commendable exercise fit for gentlemen. . . . All these are not far distant from one another, and altogether do make the most famous university for profession of law only or of any one human science that is in the world and advanceth itself above all others *quantum inter viburna cupressus.* In which houses of Court and Chancery the readings and other exercises of the laws therein continually used are most excellent and behoofful for attaining to the knowledge of those laws." How this great Law School or Legal University fell into decay there is no need to describe here. It is sufficient to say that by the end of the eighteenth century it had practically ceased to provide instruction for law students, and by the end of the nineteenth century Serjeants' Inn and all the Inns of Chancery had been dissolved, and there are now left only the four great Inns of Court, which have become the preserve of one branch only of the legal profession. For a long period after the decay of the Inns of Court and Chancery law students had to pick up their knowledge of law as they could, and for the most part learnt it merely by contact with practice, by spending a period of years in the chambers of a barrister or special pleader if destined for the bar, or being apprenticed to a practising attorney or solicitor if intended for the roll.

The modern movement for providing or re-establishing a methodical system of legal education may be said to date from the institution in the year 1833 of a course of lectures for law students by the Law Society, followed three years later by the establishment of a compulsory examination for every person seeking to be admitted a solicitor, which combined with service under articles has gradually expanded and developed into the system of training articled clerks with which we are all familiar. For long after this there was no requirement of either attendance at lectures or the passing of any examination for entrance to the bar. In 1854, however, largely by the influence of Lord Westbury—then Sir Richard Bethell—who had always been keenly interested in the subject, an address to the Crown was voted by the House of Commons praying Her Majesty to enquire into the arrangements of the Inns of Court for promoting the study of law and jurisprudence, the revenues properly applicable, and the means most likely to secure a systematic and sound

education of students of law, and provide satisfactory tests for admission to the bar. A Royal Commission, of which Lord Westbury was a member, was appointed in consequence of the address, and the Commission ultimately recommended that there should be established a preliminary examination for admission to the Inns of Court of persons who have not taken a university degree, and that there should be examinations, the passing of which should be requisite for call to the bar; and that the four Inns of Court should be united in one university for the purpose of these examinations and of conferring degrees. The fear of parliamentary interference, however, to which proceedings gave rise, led the benchers of the Inns of Court to establish the Council of Legal Education, and this body adopted a scheme less comprehensive but of a somewhat similar character to that indicated in the report of the Royal Commission, with the consequence that nothing further was done upon that report.

So matters continued until 1870, when a big effort was made. Chiefly through the exertions of Mr. W. A. Jevons, of Liverpool, there was formed under the Presidency of Lord Selborne—then Sir Roundell Palmer—the "Legal Education Association." The principal objects of the association were three, namely:—(1) To place the general course of studies and the examination preliminary to and requisite for admission to the practice of the law in all its branches under the management and responsibility of a General School of Law to be incorporated in London. (2) To make the passing of suitable examinations in the General School of Law (or of equivalent examinations of some university of the United Kingdom) indispensable to the admission of students to the practice at the bar, or to practice as special pleaders, certificated conveyancers, attorneys or solicitors. (3) To offer the benefits of the course of study and examinations to be afforded by the General School of Law to all classes who might desire to take advantage of them, whether intending or not to follow the legal profession in any of its branches, and whether members or not of any of the Inns of Court.

With a view to giving effect to these objects, in 1871, Sir Roundell Palmer brought the matter to the attention of the House of Commons, but his opportunity for doing this did not occur until so late a period in the session that it was

impossible that the subject should be then discussed. Early in the ensuing session, however, he reverted to it, placing the following resolution on the notice paper of the House of Commons: (1) That it is desirable that a General School of Law should be established in the metropolis by public authority for the instruction of students intending to practise in any branch of the legal profession, and of all other subjects of Her Majesty who may desire to resort thereto. (2) That it is desirable on the establishment of such school to provide for examinations to be held by examiners impartially chosen, and to require certificates of the passing of such examinations as may respectively be deemed proper for the several branches of the legal profession as necessary qualifications (after a time to be limited) for admission to practise in those branches respectively.

In support of these resolutions, petitions were presented signed by about four hundred barristers and about six thousand solicitors, *i.e.*, about three-fifths of the total number then practising in England and Wales. Petitions were also presented by the Law Society, the Metropolitan and Provincial Law Society, and by various provincial Law Societies, including those of Liverpool, Manchester, Leeds, Birmingham, Bristol and Plymouth, and resolutions in favour of the objects specified were passed by the congress of law students held at Birmingham in the month of June of that year. The resolutions were moved by Sir Roundell Palmer on the 1st of March, 1872, and were well supported in the debate which followed. The Government, however, put in a plea for delay on the ground that the time of the House at their disposal was fully mortgaged. On a division the motion was rejected by 13 votes only, 103 being in favour of it and 116 against. In October, 1872, Sir Roundell Palmer became Lord Chancellor as Lord Selborne, and in 1873, 1874, 1875 and 1876, bills were introduced into Parliament by him for the establishment of a School of Law, but chiefly owing to the opposition of the Inns of Court it was found impossible to obtain the assent of Parliament to any of them, and when in the latter year the Council of Legal Education was re-organised and the curriculum for admission to the bar placed on a new footing any further attempt to establish a School of Law was abandoned.

In his autobiography, Lord Selborne, describing the failure of his efforts, says: "Three causes contributed to this result, jealousy on the part of the University of London, which had a law school of its own in which several men eminent at the bar had graduated; the inert and suspicious conservatism of the Inns of Court; and a strong prejudice against bringing together under one system of education future barristers and future solicitors. Of these the first cause deprived me of the support of Lowe, then member for the University of London, who at the beginning of the movement had been one of its well-wishers. It also, I have no doubt, contributed to make Jessel, when Solicitor-General in 1871, my vigorous and effective opponent. The Inns of Court passed from an attitude of hesitation, in which some of them were more and others less favourable, into one of opposition from the fear that they might lose their independence and the control of their own funds. It was of the essence of the scheme that they and the Incorporated Law Society should co-operate in it; the use, for at least some time, of buildings belonging to them and contributions from their funds, would be necessary; it was not expected that either by donations from other sources or by means of students' fees, the new School of Law could be made from the first self-supporting; nor would it have been desirable if practicable that it should be established apart and without the aid of those institutions. It was not, however, proposed to place the new school either wholly or in part under the control of any of them; all were to be proportionately represented upon one governing body. In the existing government of the Inns of Court there was the spirit of private clubs more than public bodies. It was not in the hands of the most busy and active members of the Bar; they might from time to time succeed to or be elected to the principal offices; but they were too much occupied to devote to the business of those societies any large share of their thoughts or time. The dominant influence was that of the men who were always there, most of whom had little business of their own, or had survived such business as they once had, or had leisure for at least a great part of the year. Among such men habit and *esprit de corps* is generally much stronger than zeal for reform. It was said by Lord Westbury that the strongest of all a man's attachments was to his Inn of Court. Whether this was irony or

satire or mere paradox, I do not know; perhaps as to those men who were never absent from the dining-hall or the council chamber of the Inn, it may have been no more than a fantastic exaggeration of the truth. All those men were against any plan of legal education. The prejudice against bringing future barristers and future solicitors into contact with each other, under a common system of preliminary instruction, also told forcibly—I am not sure whether it was not the most potent of the adverse influences with which I had to contend. I regarded it as a prejudice neither liberal nor reasonable. Nothing I thought could be said for it, either from a public or from a social point of view. No man could estimate more highly than I did the public interest in the character of the bar. But in all that could tend to furnish the minds and elevate the character of the larger, the more numerous, and generally diffused class, in whom a closer, more constant and more habitual confidence must necessarily be reposed as to private affairs by men of all orders in all parts of the country, the public interest was, at least, equally great. From a social point of view to treat barristers as if they ought to belong to a different caste from solicitors, whose sons, brothers, or sons-in-law, many of the most successful and honourable among them were, would be simply absurd."

Thus perished the Jevons-Selborne scheme for a School of Law, and after its failure the subject was allowed to sleep for a quarter of a century, except that in October, 1895, Lord Russell, of Killowen, then Lord Chief Justice, delivered an address in Lincoln's Inn Hall, in which he made an attempt to re-awaken interest in it; but nothing practical resulted from his efforts.

In 1902, however, the matter again acquired prominence as an unexpected consequence of the sanctioning of the Strand Improvement Scheme of the London County Council. For the purposes of this scheme the council required to take the land and buildings belonging to New Inn, and in that year proceedings were commenced at the relation of the Law Society for the purpose of determining whether the members of the Inn were entitled to the proceeds of sale of the Inn for their own benefit or not. These proceedings resulted in an order of the Court, dated the 22nd of July, 1902, which directed that a sum of 55,000l., part of the proceeds of sale of New Inn then in Court,

should be carried over to a separate account, and that a proper scheme for its application should be settled by the Judge. About the same time, the members of Clifford's Inn, the only remaining Inn of Chancery, determined to dissolve their society and dispose of their property, and in this case also an action was commenced with the object of determining whether the property was subject to or affected by a charitable trust, the Attorney-General being made a party. In this action, which is reported in the "Law Reports' as *Smith* v. *Kerr*, Mr. Justice Cozens-Hardy, as he then was. decided that the property of the society was held on a charitable trust, and on appeal the decision was affirmed by the Court of Appeal. The land and buildings of Clifford's Inn were sold on the 14th of May, 1903, and realized the sum of £100,000.

There was thus supplied a sum of about £150,000, earmarked for the purposes of legal education, and the then Attorney-General, Sir Robert Finlay, determined to make a further effort to get it applied to the establishment of a School of Law. To quote his own words on an application to the Court in the proceedings above referred to: "Before the fund is distributed one great object should be kept in view, and that is, to see whether the opportunity of this fund being available can be taken advantage of for the purpose of promoting and establishing in London a great School of Law under Charter or Act of Parliament, in which full provision should be made for the systematic and scientific teaching of all branches of our law, and also of all those other branches of law which are administered in the British Empire. It is the fact that students come here from all parts of the Empire to study law. For the purpose of such a School of Law, in our view, it is essential to have the co-operation of the great historical bodies, which have been associated with the study and practise of the law in the country for so long, namely, the Inns of Court," and Mr Justice Farwell, who expressed his cordial approval of the proposal, therefore made an order suspending further proceedings until the scheme could be brought forward. Accordingly a committee of the four Inns of Court was, by the Attorney-General's influence, appointed to consider the matter, and this committee reported in favour of a scheme creating a new authority for legal education to be composed of persons named by the Inns of Court and the Law Society;

that the Inns of Court should contribute annually for the work of the education authority, and that the funds in Court derived from the sale of Clifford's Inn and New Inn should be devoted to the purposes of this authority, and that when the School of Law was established, its governing body should be constituted of representatives of each Inn of Court, of the Law Society, the Universities of Oxford, Cambridge, and London, the Lord Chancellor, the Foreign Secretary, the Colonial Secretary, and the Secretary for India.

This scheme received the cordial support of the Law Society and was approved by the Council of Legal Education, by the Middle Temple, by Lincoln's Inn, and by Gray's Inn, but under the inspiration, it is said, of a very distinguished bencher, noted for the somewhat conservative disposition of his mind, the Inner Temple at the end of June, 1903, determined to withhold its further adherence to the Attorney-General's scheme. As a consequence of the abeyance of the scheme an order was made whereby one-half of the residue of the income of the funds, after providing for certain annuities, is paid to the Law Society for the purposes of legal education, the other being paid to the Council of Legal Education. In 1910 the sum paid to the Council of the Law Society amounted to £1,752 6s. 8d.

Thus perished the Finlay scheme, but it is permissible to hope that, unlike its predecessor, it has not perished utterly. On January 13th, 1905, the council of the Law Society passed a resolution that the thanks of the Council be offered to the Attorney-General for the efforts which he had made to establish a School of Law, and that while the council regretted that impediments had arisen which had prevented him from accomplishing this object, they hoped that these would prove temporary only, and that at no distant date a School of Law might be established adequate to meet the needs of both branches of the profession and the community at large, and pledging themselves to use every means in their power to establish such a school. The fund still remains awaiting a healthier condition of public opinion in the legal profession, and it is the hope that that healthier condition is slowly but surely being developed, that the subject is now reverted to.

It is suggested that the time has arrived when a further effort might be usefully made. The present Attorney-General might be asked once more to sound the benchers of the

Inns of Court and the other authorities concerned on the subject of the Finlay scheme It can hardly be denied by the thoughtful observer that the desire for the establishment of a great Imperial School of Law exists and is widespread, and even the Inns of Court cannot maintain for ever their attitude of passive resistance to reform.

It should not be overlooked, of course, that since 1903, when the Law Society appointed a principal and director of legal studies, they have had a successful and flourishing Law School of their own, and that the Council of Legal Education have, to some extent, followed their example in the re-organization of their system, which has taken place during recent years. But it is no disparagement to the able and distinguished men who work these systems to say that separate and divided jurisdictions of this kind do not, and cannot be made to, supply the want of a great central School of Law open to both branches of the profession indifferently. One may quote from Lord Russell's address referred to above: "The lines of study of the two branches must be, to a large extent, similar. Why should they be kept apart? Their separation is a waste of power and loss of advantage to both. See the enormous gain to the cause of legal education from the junction of the two branches. With increase of numbers comes increase of emulation amongst the students and consequent incitement to the teachers to put out their best efforts."

One important advantage that would be conferred by such a school would be the improvement of the form of our law. "There is no factor which will prove so potent for the simplification and the systematization of our law as its scientific teaching in a great school of law," said Lord Russell in the address above referred to. "A scientific education for lawyers is the corner-stone of a clear legal system," another has written. What a beneficent part, too, an Imperial School of Law might play in the codification and thereby in the unification of the law throughout the Empire. There are few men nowadays who do not hope for some kind of federation of the British peoples throughout the world. Almost as potent an influence in achieving this dream as fleets and armies would be the possession of one common system of law and the administration of justice.

Since this was written we have seen the centrifugal tendencies operating in the provisions of the Acts, creating the

Commonwealth of Australia and the Union of South Africa prohibiting appeals to the Privy Council. A great Imperial School of Law would do much to stay such tendencies. It would even change the course of the current and make it flow towards unity. I put it to this meeting that the establishment of such a school as this—one which should be the resort of all students for whatever branch of the profession they may be destined, and whether they intend to follow their profession in England or in the great Dominions and dependencies beyond the seas—one in which the greatest masters of the common law will deem it an honour to accept office and give instruction—which shall be more than the rival of the greatest law schools of the past and present, whose glories shall exceed those of Berytus, of Bourges, of Bologna and of Harvard—is an ideal worthy of the best efforts of us all.

THE DUTIES OF AN ATTORNEY.*

The growing interest of the Bar in maintaining and raising the standards of professional excellence and professional conduct is indicated by the raising of the requirements for admission to the Bar, and by the adoption of the Bar Association of specific canons of conduct, rather ethical than strictly legal in their nature. In response to this interest our Bar examining committee has recommended a course in legal ethics, and has made legal ethics a subject of examination. You, gentlemen, have the honour of being the first group of candidates to pass an examination in legal ethics. Your text has been the attorney's oath of office for this State; the declaration of legal ethics adopted by the State Bar Association, and Sharswood's Legal Ethics. That you are here in Court awaiting the order that shall admit you to the ancient and honourable privileges and responsibilities of the attorney is a sufficient voucher that you are reasonably familiar with the practical precepts involved in ethics as applied to the professional conduct of attorneys at law. I shall not, therefore, attempt to re-

* Address by Hon. Edwin Baker Gager, M.A., Professor of General Jurisprudence, Yale Law School, to the Applicants for Admission to the Bar of Connecticut, in the Superior Court, June 20, 1911.—*The Yale Law Journal.*

capitulate here that in which you are certified by the Bar examining committee as being already reasonably proficient. It is, however, my official duty, imposed by rule of Court, to address you upon your duties and responsibilities as attorneys.

Assuming your familiarity with the general subject, I wish this morning to direct your attention to certain matters which may appear obvious, and yet the neglect of which has caused many a young man, starting with prospects as bright as yours, to become a failure as a lawyer, and sometimes as a man. Some of you may remember the beautifully accurate description of a juris-consult given by Cicero. He must be "skilled in the laws, and in the usages current among private citizens, and in giving opinions and bringing actions and guiding his clients aright."

Your first and foremost duty, then, is to know the law. It is an ancient saying that the law is a jealous mistress, requiring ceaseless, single-hearted and enthusiastic devotion as a condition of her favours. To know the law is not simply to learn it once for all, to pass your examination and then merely draw from your knowledge as occasion requires. Even you, fresh from the learning of the schools, will soon find your sources run dry if you do not diligently, in season and out of season, pore over the books, exhausting, so far as practicable, the law of such matters as may come to you, and, should you have leisure, delve in those fields in which work is most likely to come. The longer I live the more clearly I see and the more strongly I realize that the reason why so many fail to reach a high standing in the profession is that in the earlier years of their practice they did not adequately realize that the law is and always will be a learned profession, involving a lifetime of labour as the condition of its highest rewards. The man who knows is the man sought for by those desiring assistance in any profession; and it is as true of the lawyer as of the engineer, the surgeon or the specialist in any line; and this knowledge, to be effective, must be your own knowledge. Beware of the habit of trying to get your law by asking older lawyers, trying to get it upon the streets, and so getting that worthless article familiarly known as curbstone law. Get your law for yourself; cultivate confidence in yourself and in your own powers of research and of reasoning, and then, for confirmation or correction, you may consult

some older lawyer in whom you have confidence. To know the law means, for us, that so long as we remain in the profession we will continue to study the law, or that part of it which we more particularly affect. And here let me urge you, if you would become lawyers with the larger outlook, with a comprehensive grasp of the real meaning of the law and the mighty part it has played in the advancement of civilization, not to confine your reading and study to the concrete rules of the system of law you may practice. Intimately connected with these rules, their ground work, the substratum, in fact, of the philosophy and theory of law, illustrating, explaining and vivifying it, are the history of law, comparative law, the principles of legislation and the principles of morals. The law you practise comes first, but to these subjects I have named should be cultivated in due proportion; and, as the years go by, the law will grow more and more interesting, its practice will give constantly increasing satisfaction, you will become more efficient lawyers, wiser, sounder, safer and better men.

Another duty is that of intellectual honesty. In its results intellectual dishonesty is about as bad as moral dishonesty. By intellectual honesty I mean thinking straight and seeing clear and applying the results fairly to the case in hand. If you do not reason clearly, if your constructions are strained and your applications far-fetched, the Court and Bar will soon find it out, and the penalty will be that as little attention will be paid to your arguments and to your claims as would be to your statements of fact were you known to be morally dishonest. Indeed, sometimes a lawyer will get a reputation for moral obliquity when the simple fact is that he persistently reasons himself into statements of law and claims of fact and courses of conduct which he thinks the necessities of his case impose, while the dispassionate observer finds it difficult to differentiate between his conduct and that of the confessedly dishonest man.

Not only must you get learning, know your subject, and also be intellectually honest in your reasoning and conduct in legal matters, but you must be morally honest with the Court, your clients, your professional brethren, and I believe, above all, and as the sum total of it, be honest with yourselves.

Quoting from our Connecticut Code of Legal Ethics, I will read this:—

As an officer of the Court seeking to ascertain the truth, establish justice and defeat falsehood, and as the representative of the litigant entitled to his just rights, the lawyer cannot perform the duties he undertakes unless he acts in strict obedience to the laws of truth and fidelity.

Lord Bacon said that "The end and aim of law is to enable men to get on comfortably together." This is as true of the moral law as of the positive law. In a special, concrete sense the end and aim of legal ethics is to require such conduct from lawyers with respect to the Court, the client, and the brethren of the Bar, as shall enable them all to get on comfortably together, and such conduct is based on confidence, born of experience, in the absolute veracity, honour and fairness of the lawyer. What I want you to note here for a moment is that these rules of common honesty grouped together under the term "legal ethics" are not by authority imposed upon lawyers from without, but they are drawn from observation of the actual conduct and practice of the honourable, high-minded members of the profession. They are, so to speak, the customary law of lawyers in their professional relations, and their binding force lies in the fact that for hundreds of years they have in practice been recognized as vital to the usefulness and the continued existence, even, of the legal profession.

The antiquity of the oath for admission to the Bar indicates this; the oath which will be administered to you was, in almost its identical language of to-day, passed by the General Assembly of this State in 1708, and in England, dating sometime between 1246 and 1402, we find a record of the attorney's oath which sounds strangely familiar. Let me read it to you, taken from the Book of Precedents in the Court of Exchequer, "The Oath of the Attorneys in the Office of Pleas:"—

"You shall doe noe Falsehood nor consent to anie to be done in the Office of Pleas of this Courte wherein you are admitted an attorney. And if you shall knowe of anie to be done you shall give Knowledge thereof to the Lord Chiefe Baron or other his Brethren that it may be reformed you shall Delay noe Man for Lucre Gaine or Malice you shall increase noe Fee, but you shall be contented with the old Fee accustomed. And further you shall use your selfe in the Office of Attorney in the said Office of Pleas in this Courte according to your best Learninge and Discrecion. So helpe you God."

In spite of the cheap gibes we sometimes hear, no class of men is practically held in such confidence as the members of the Bar. Life, liberty, property, political and civil rights, are all intrusted to them, and how seldom is that confidence violated, and how soon is one, known to have violated such confidence, overwhelmed with disgrace! He is either disbarred or becomes a pariah in the profession.

Locke said of moral rules that "No one escapes the punishment of their censure and dislike who offends against the fashion and opinion of the company he keeps, and would recommend himself to it." If you would recommend yourself to the company of the Bar, you are about to enter, you must beware lest you offend against its fashion and opinion as set forth in legal ethics. The penalty may be discipline or disbarment, and a blasted professional life.

Here let me remind you that legal ethics is not strictly a special kind of ethics or morals but it consists in the application of those general moral rules which should govern the conduct of us all to those special relations arising from the nature of the lawyer's business. If, in the broad sense, a man is sound morally, his legal ethics will cause him little difficulty.

Again, the lawyer is not the servant of his client, he is not the servant of the Court, but he is an officer of the Court. I want you to realize that, gentlemen, as some justification for the years of labour that you have been through, and of the care that is attempted to be exercised in the selection of those who are admitted to the Bar, because the admission to the Bar makes you an officer of the Court, and the office continues during good behaviour, and the lawyer has as much right to appear in Court as the Judge to sit upon the bench. In *Ex p. Garland,* 4th of Wallace, 333, the Court said:—

"The attorney being by the solemn judicial Act of the Court clothed with his office, does not hold it as a matter of grace and favour. The right which it confers is not revocable at the pleasure of the Court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the Court for moral or professional delinquency."

In the case *In re Thomas,* in the 36th Federal Reporter 243, an application for the disbarment of an attorney because of alleged unprofessional and immoral practices, Mr.

Justice Miller spoke thus of the attorney as an officer of the Court:—

"The lawyer in this country is one of the administrators of justice. The Judge who presides in the Court is another, with more authority of position, and, perhaps, in some respects a more burdensome one. But the Court, and the clerk, and the marshal, the sheriff, the jury, the lawyer, all constitute ministers of justice; and a lawyer who consciously undertakes to thwart justice is unfit for the position, as much as the Judge who accepts a bribe, or knowingly decides a case against the law and the right; and it should be understood that they [that is, the lawyer and the Judge] are subjected to the same responsibilities. They have a duty, undoubtedly, to their clients, but this is not the first duty, as is generally supposed Their first duty is the administration of justice, and their duty to their client is subordinate to that."

Remember that, gentlemen, when you appear in Court, and when lines of conduct are suggested to you, that it is your duty to handle your case and to present it to the Court with the same scrupulous faithfulness and honesty and fairness that you expect of the Judge in reaching his decision.

Yesterday at the alumni dinner of the Yale Law School we heard the law referred to as a "noble profession." It has to do with the administration of justice: earthly justice, to be sure, but here and now, touching us all in the most vital points, and it is the nearest approximation to the ideal of enforceable rules of conduct that the social organization has hitherto succeeded in developing. But may we not believe and feel that it is a noble profession, and has become recognized as such, not only because it is noble by reason of its character, but because its successful practice requires noble men; men disinterested, fearless, self-sacrificing, faithful, whose word is as good as their bond, men to whom you would entrust all that is dearest and most valuable to you with implicit confidence that to the utmost of their ability they would serve and protect you in accordance with the laws of the land? Let me entreat you, as you enter your profession, to take such men, and we all know them, as your exemplars. Form an ideal for yourself; that you will know the law, that you will be intellectually honest, that you will scrupulously observe the requirements of the ethical rules of your profession so that they may become a second nature to you,

that you will guard and cherish your reputation as an officer of the Court to which you are admitted, that you will take up and preserve the best traditions of a long line of lawyers reaching from the days of Edward I., the English Justinian, when England, as Freeman says, became the "domain of lawyers," to the present, when the president of our country, the governor of our State, the mayor of perhaps the second city in the world, have been taken from the Bench, and high officials innumerable have been taken from the ranks of the Bar—by the consideration of these things, form your ideals, and, so far as in you lies, live it and hand it on to your succeeding generations untarnished by any wavering in devotion or remissness in practice. Apply to yourselves as lawyers the words of President Hadley, in his inspiring baccalaureate sermon last Sunday:—

"We must learn to feel, both as individuals and as communities, that we have a place in history; that we stand in a long succession of men who have inherited principles and ideals from our fathers and who are to transmit to our children those principles and those ideals in greater fullness and strength. When we can really feel that we and those about us are part of a great movement of human life from age to age, then, and not till then, do we feel the best of inspirations, that which comes of working for all time. We must learn to get hold of the best traditions of the past, and really work them into our lives, because by this means we can get hold of ideas for the future which will make life worth living"

In 1648, Lord Commissioner Whitelocke instructed the new Sergeants-at-law appearing at the Chancery Bar for the degree of Sergeant-at-Law, as to the nature and duties of the lawyer's office; and I close with a quotation from what the Commissioner then said, as shewing that our Judges, in providing for this ceremony, practically revive a custom existing certainly as long ago as 1648, because we have the specific record of what was then said by the Commissioner to the young men then standing before him as applicants for the degree of Sergeant-at-Law. He said:—

"I hold it not impertinent to mention something to you of the duties of an advocate; which are some of them to the Courts and some to the clients. To the Courts of justice he owes reverence, they being the high tribunals of law, and therefore great respect and reverence is due to

them from all persons, and more from advocates than from any other. An advocate owes to the Court a just and true information. The zeal of his client's cause, as it must not transport him to irreverence, so it must not mislead him to untruths in his information to the Court . . . The duties of advocates to their clients are general and particular. The general consists in three things: secrecy, diligence, and fidelity. For secrecy: advocates are a kind of confessors, and ought to be such, to whom the client may with confidence lay open his evidences, and the naked truth of his case, and he ought not to discover them to his client's prejudice; nor will the law compel him to it"

You remember the privilege of the attorney with reference to testifying as to communications between attorney and client; and I want to impress upon you most strongly that idea, that when you get in practice and people come to you to talk over their matters, those matters should be absolutely sacred and never travel beyond your lips, or beyond the work of the office, and the communications of the office necessary for the purpose of transacting the business.

"For diligence: much is required in an advocate in receiving instructions, not only by breviats, but by looking into the books themselves, in perusing deeds, in drawing conveyances and pleas, in studying the points in law, and in giving a constant and careful attendance and endeavour in his client's causes.

For fidelity: it is accounted *vinculum societatis*, the bond of society. The name of unfaithfulness is hateful in all; and more in advocates than others, whom the client trusts with his livelihood, without which his life is irksome; and the unfaithfulness or fraud of the one is the ruin of the other.

And, as was perhaps more common in those times, he illustrates his meaning by reference to the classics:—

"Virgil, in his fiction of Aeneas going down to hell, sets these in the front of the crimes [and I give you the translation]: Here (that is, down where Aeneas was wandering through the confines seeing and observing the shades who were the denizens of that disagreeable region), those who, while alive, hated their brothers, beat their parents, or defrauded their clients, imprisoned, await punishment.

"For your duty to particular clients you may consider, that some are rich, yet with such there must be no endeavour to lengthen causes, to continue fees. Some are poor;

yet their business must not be neglected if their cause be honest; they are not the worst clients, though they fill not your purses they will fill the ears of God with prayers for you, and He who is the defender of the poor will repay your charity. Some clients are of mean capacity; you must take more pains to instruct yourself to understand their business. Some are of quick capacity and confidence, yet you must not trust to their information. Some are peaceable, detain them not, but send them home the sooner. Some are contentious, advise them to reconcilement with their adversary. Among your clients and all others, endeavour to gain and preserve that estimation and respect which is due to your degree and to a just, honest, and discreet person. Among your neighbours in the country, never foment, but pacify contentions."

So you see, gentlemen, that this custom that we are fulfilling here this morning, in obedience to the mandate of the Judges, is of long existence and that the notions that we try to instill into you, it has been the aim of Judges for a long time to instill into those days the Judge, whose official duty led him to pass the order transforming them from private citizens to officers of the Court, was moved by the same kindly feeling of interest in their welfare and in their future that we feel here to-day. For, in concluding his address, we find that the Lord Commissioner away back there in the days of the Roundheads and the Cavaliers, extended to the new Sergeants-at-Law before him his best wishes.

And so I, as representing our loved and honoured State, extend to you, as you enter the Bar of Connecticut, in the language of the Lord Commissioner in 1648, my heartiest and best wishes: "And what honour and advantage hath been gained by any of the most eminent of your predecessors in this degree, I do heartily wish may be multiplied unto you."

CANADIAN NEWS.

Hon. S. C. Biggs, K.C., of the law firm of Biggs & Biggs, Toronto, died on the 27th September. The late Mr. Biggs was admitted to the Manitoba Bar in 1875, and subsequently was Minister of Public Works in that province. In 1888 he removed to St. Paul, Minn., where he practised until he came to Toronto in 1892, where he has practised ever since.

Sir Lomer Gouin was married at Montreal, on the 19th September, to Miss Alice Amos.

Miss Belle French has made application to the Law Society of British Columbia, for permission to practise law in that province.

Arthur H. Russell, barrister, Red Deer, was married on the 30th August, to Miss Kathleen Roberts, of Seaforth, Ont.

The law firm of Russell & Russell, Red Deer, has been dissolved, F. H. Russell taking over the practice at Vegreville. W. C. Robinson, late of the law firm of Christie & Robinson, Windsor, N.S., has become associated with F. H. Russell, the new firm being known as Russell & Robinson.

E. H. Dawson, barrister, Strome, has retired from practice, owing to ill health. Barnett & Gibson have taken over his practice.

A. S. Langlois, of the law firm of Smith & Langlois, Cornwall, died on the 1st of October.

Donald C. Sinclair, of New Glasgow, and Arthur D. Thomas, of Truro, have been admitted to the Nova Scotia Bar.

S. L. Dale, Paris, has commenced practice at Montreal.

J. H. Botsford, of the law firm of Buell & Botsford, Brockville, died on the 30th September.

R. W. Hanington, of the law firm of Russell, Russell & Hanington, Vancouver, has removed to Nelson, B.C.

E. A. Deacon, J. H. Couch, J. B. Monteith, and C. A. Adamson, were sworn in as solicitors at Winnipeg, on the 27th September.

Edmonton law students have organized with the following officers: Hon. President, Hon. C. R. Mitchell, Attorney-General; Hon. Vice-President, Miss Bessie Nichols; President, N. R. Lindsay; Vice-President, A. H. Gibson; Secretary-Treasurer, G. S. Matthews; Critic, W. Wells; Librarian, J. Archer.

Hon. Louis M. Champagne, Judge of the Superior Court Pontiac District, Quebec, died at Ottawa, on the 14th October.

C. A. Irvine, barrister, Saskatoon, has opened a branch office at Wilkie, in charge of R. J. G. Dow.

Hugh McKenzie, K.C., died at Truro, N.S., on the 7th October.

Richard H. Greer, of the law firm of Smith, Rae & Greer, Toronto, has been appointed Crown Attorney for the county of York, as successor to the late Jas. Baird, K.C.

Hon. Wm. Pugsley will resume practice at St. John, N.B.

The law students of Winnipeg are forming a social club.

B. E. S. Gunnfield and Frank Summers have been admitted to the Law Society of Newfoundland.

Paul Layton, of Truro, N.S., has removed to Vancouver, B.C., to join the law firm of Bowser, Reid and Wallbridge.

H. E. A. Robertson, barrister, of the law firm of McEvoy, Whiteside, Robertson & Buddle, Vancouver, has joined the real estate company of Short, Robertson & Seymour, Ltd.

Robert S. McLellan, of Sydney Mines, N.S., has been admitted to the Nova Scotia Bar, and it is likely that he will remove to Western Canada.

J. M. McDougall, K.C., Hull, has been appointed Judge of the Superior Court of the Ottawa District.

C. A. Tufts, of the law firm of Shaffner & Tufts, Kentville, N.S., has become associated with G. A. Cruise, barrister, Saskatoon.

John Cairns, barrister, Saskatoon has removed to Zealandia, Sask.

G. H. Barnard, M.P., for Victoria, has retired from the law firm of Barnard, Robertson & Heisterman.

John B. Holden, barrister, Toronto, has taken into partnership with him, George A. Grover, the firm name being Holden & Grover.

Kenneth J. Martin, barrister, Charlottetown, has been appointed Judge of the City Court of Charlottetown.

At the recent meeting of the Law Society of Prince Edward Island, A. A. Macdonald was elected President, C. R. Smallwood, Vice-President, and W. E. Bentley, Secretary-Treasurer.

Hon. O. T. Daniels, of Annapolis, has been appointed Attorney-General of Nova Scotia, in succession to A. K. McLean.

Hon. C. H. Campbell has resigned from the office of Attorney-General of Manitoba, to preside over the Department of Public Works for that province.

Hon. James Howden has resigned as Provincial Secretary to become Attorney-General of Manitoba.

E. S. Senkler, barrister, of North Bay, has become associated with R. R. Loscombe, K.C., of Bowmanville, the new firm being known as Loscombe & Senkler.

W. J. M. Cass, barrister, Winchester, has formed a partnership with W. B. Lawson, K.C., Chesterville, the new firm being known as Lawson & Cass.

A. E. Christian, who has been associated for many years with J. E. Farewell, K.C., Whitby, has taken over the practice of R. J. G. Dow, at Oshawa.

W. T. Howell, formerly barrister, of London, Eng., and who has recently been living at Kootenay Lake, Nelson, B.C., died on the 4th October.

John A. Sinclair, barrister, St. John, was married on the 3rd October, to Miss Annie McKenzie, of Westmount.

W. R. Howley and W. R. Warren, St. Johns, Nfd., have been appointed K.C.'s.

Duncan Stuart and William Warner, barristers, Calgary, have formed a law partnership at that city, under the firm name of Duncan Stuart & Warner.

R. A. Pringle, K.C., Cornwall, has formed a law partnership at Ottawa, with Thompson & Burgess, the new firm being known as Pringle, Thompson & Burgess.

H. C. Hanington, barrister, Victoria, B.C., has been appointed Inspector of Legal Offices for British Columbia.

Hon. L. P. Pelletier, Postmaster-General, has formed a new law partnership, at Quebec, the firm name being Belleau, Pelletier, Belleau, Baillargeon & Belleau.

Hon. C. J. Doherty, K.C., M.P., Minister of Justice, has resigned his professorship in law at McGill University, and has been appointed by the Board of Governors, Professor Emeritus in the Faculty of Law Two new appointments have been made by the Board of Governors, P. G. Mignault, K.C., to be professor of Civil Law, Mr. Gordon W. MacDougall to be professor of private and international law, Mr. E. A. Howard has been appointed lecturer in Civil Procedure.

Hon. L. J. Tweedie, whose term as Lieutenant-Governor of New Brunswick, will shortly expire, announces that he will resume practice.

A. S. Bell, barrister, of Pictou, N.S., has been appointed a Senator of that province.

W. H. Hearst, K.C., Sault Ste. Marie, has been appointed Minister of Lands, Forests and Mines, for the province of Ontario.

NOTES OF CASES.

UNREASONABLE WITHHOLDING OF CONSENT TO ASSIGNMENT.—Where a lease contains the usual covenant against assignment without the lessor's consent, such consent not to be unreasonably withheld, the lessee is set free from the covenant and is entitled to assign without license, if the consent is in fact unreasonably withheld. But until it has been judicially determined that the withholding of the consent is unreasonable he incurs considerable risk by adopting this course for if he makes a mistake he is liable to forfeiture of the lease. Hence he is entitled to go to the Court for a declaration that the lessor's consent has been unreasonably withheld and such an order has been made in several cases, *Young* v. *Ashley Gardens Properties* (*Limited*) (1903, s. Ch. 112), *Jenkins* v. *Price* (1907, s. Ch. 229). In recent case of *Evans* v. *Levy* (1910, 1 Ch. 452), the lessor refused consent to a re-assignment by the assignee of a lease to his wife except on condition that he should covenant for payment of the rent and performance of the covenants during the whole residue of the term. Eve, J., held that this was unreasonable though he considered that it would have been reasonable to require the husband to covenant as surety for his wife. Accordingly the plaintiff obtained a declaration that the condition was one which the lessor was not entitled to impose. In *Young* v. *Ashley Gardens Properties* (*Limited*) (*supra*), the unsuccessful lessor was ordered to pay the costs. In *Jenkins* v. *Price* (*supra*), he escaped costs on the ground that the lessor came for a declaratory judgment only, and had no cause of action. In the present case, Eve, J., has followed the latter authority though, apart from this technical reason, the costs ought apparently to be paid by the lessor, who has set up an untenable contention.

IMPROPER ADMISSION OF EVIDENCE.—In the recent case of *Allen* against *The King* (44 S. C. R. 331), an important decision has been given by the Judges of the Supreme Court in favour of the prisoner upon his trial. In that case, Allen, a soldier, was charged with having murdered his captain, Peter Elliston. At the trial on giving his evidence on his own behalf, he was asked by the Crown counsel if he remembered a witness, named Corrigan, giving his evidence in the Police Court, at the preliminary investigation, and on answering that he did, was asked another question tending to shew that Corrigan proved that the prisoner threatened Elliston's life. Corrigan was not produced before the jury, and the intention of the Crown's cross-examination of the prisoner was to have Corrigan's evidence of threats made by the prisoner upon the life of the deceased, admitted substitutionally. Although the prisoner denied having heard Corrigan make some of the statements in the witness box, but admitted that he had heard Corrigan make some of them, the Supreme Court of Canada held that this was unfair to the prisoner, and he having been convicted of murder, a new trial was granted. The Supreme Court said that although the prisoner might be asked if he had made previous threats against his victim's life, the jury cannot be informed by the Crown prosecutor that a witness examined at the preliminary inquiry knew of the prisoner having made such threats, unless the witness is produced. The Supreme Court was of the opinion that although it was possible to say whether sufficient evidence was produced to convict the prisoner of murder without this improper evidence a substantial wrong was done to the prisoner and another trial on his behalf was allowed.

This case is rather a novelty in as much as it attempts to bring back the law to the position dictated both by common sense and justice. The general practice has been to regard the prisoner on entering the box in his own behalf as the target for every possible kind of insinuating inquiry, shrewd cross-examination can suggest. The cross-examination of a prisoner should be confined to the inquiry merely whether he is innocent or guilty of the charge, and should not be permited to be a means of subjecting him to the investigation of his past life. Many an innocent prisoner refrains from entering the witness box because his atoned-for past is liable to be made the substitute for his present ad-

mission of guilt. This case is an important one for all these reasons. A. R. H.

AGENT'S COMMISSION. — In the case of *Stratton* v. *Vachon* (44 S. C. R. 395), an important decision with regard to commission of agents is given by the Supreme Court of Canada. In that case, one named Flanagan, owned lands in Saskatoon, and agreed to pay Stratton for selling the same. A man named Moore, was induced by Stratton to look into the matter with a view to purchasing the property, Moore looked into the matter, but found it impossible, and proceeded to introduce the property to two of his friends, named Millar and Robinson. Moore retired from the sale, and Flanagan dealt with the entire purchase, closing with them on different terms from those mentioned to Stratton, the agent. Stratton was held by the Supreme Court of Canada to be entitled to his commission under the above circumstances. A. R. H.

CONSPIRACY TO DEFEAT THE ENDS OF JUSTICE.—The case of *Rex* v. *Flaunty and Tyler,* which was heard at the Old Bailey on October 11th, presented some curious circumstances. On August 28th, Tyler had been convicted at Woolwich Police Court, and sentenced to 21 days' hard labour, for drunkenness and disorderly conduct. On his removal to Wandsworth prison the other prisoner, Flaunty, who was about to be discharged, contrived to change places with Tyler; each answered to the other's name when the roll was called, so that Tyler went free while Flaunty took his place. This apparently magnanimous act of impersonation was explained by the fact that, according to the prison witnesses, Flaunty had a curious gift—that of dislocating his ankle whenever he wished to do so. Accordingly, when in gaol, he had invariably been placed in the infirmary—no great hardship to a man of his class. Whether or not this explanation was the right one, both prisoners were clearly guilty of conspiracy to defeat the ends of justice, and each was sentenced to six months' hard labour. Such conspiracies were made punishable by the celebrated statute of 33 Edw. I., the *Ordinacis de Conspiratoribus,* the wording of which (so far as relevant), is in the following archaic terms: "Conspirators be they that do confer or bind themselves by oath, covenant, or other alliance that every of them shall

aid and sustain the enterprise of the other, false and maliciously to indict or cause to be indicted, or falsely to acquit people . . ." The word "acquit" here, no doubt, includes any assistance to a prisoner to escape punishment. It is under this statute that an agreement to indemnify bail has been held to be an indictable conspiracy (*Rex* v. *Porter*, 1910, 1 K. B. 369). The reason is that such an indemnity may assist prisoners to obtain bail in improper cases, and thereby defeat the ends of justice by absconding. In *R.* v. *Hamp* (6 Cox 167), it was held to be conspiracy if one witness bound over to attend a trial agreed with others not to attend, and so enabled the accused to escape conviction.

COMMITTAL OR ATTACHMENT. — Popularly, "attachment" and "committal," are treated as convertible terms, and attaching or committing a defendant as synonymous names for the same process, but this is a mistake. There is a real difference between the two remedies, which is still important in some cases. The cases to which the two processes respectively apply were thus distinguished by Mr. Justice Chitty in *Callow* v. *Young* (1887): "Committal was the proper remedy for doing a prohibited act, and attachment was the proper remedy for neglecting to do some act ordered to be done." This difference, which before the Judicature Acts was well established and recognized, was, to a great extent, done away with by the terms of Order XLII., Rule 7, which provides that "A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment or by committal." A new and important difference in the procedure on the two remedies has now been discovered, or rediscovered, by the Court of Appeal, which recently in *Taylor, Plinston Brothers & Co.* v. *Plinston*, reversed a decision of Mr. Justice Warrington, holding, on a motion to commit for breach of an injunction, that Order LII., Rule 4, which requires every notice of motion for attachment to be accompanied by a copy of any affidavit intended to be used on it, referred to every motion under which a person might be attached and taken into custody, and that no distinction was to be drawn in construing it between motions for leave to issue a writ of attachment and motions to commit: The question in issue was said to be decided by *Litchfield* v. *Jones* (L. R. 25 Ch. D. 647), the headnote of which runs as follows:—

"On giving a notice of motion to commit a defendant for contempt for disobeying an order for discovery the plaintiffs omitted to serve with the notice of motion a copy of an affidavit, which they stated in the notice that they should read in support of the motion. Held, that rule 4 of Order LII. applied to such a motion, and not only to a case in which a writ of attachment would have been issued under the old common law practice, and that the motion was therefore irregular."

The Master of the Rolls, who, as Mr. Cozens-Hardy, Q. C., had appeared for the respondent to this motion before Mr. Justice North in 1884, said that the case was argued on both sides with regard to a motion of attachment and that, any other view of the case as reported would have made the judgment of Mr. Justice North irrelevant. No other authority on the question was to be found in the books, and although the text-writers had adopted the view that affidavits must be served with the notice of motion, whether to commit or attach, that was because they had accepted the statement of the law contained in the headnote to *Litchfield* v. *Jones* in the Law Reports. It was contrary to the plain meaning of the rule that it should apply to motions to commit, and inconsistent with the policy of the rules on the subject. It was never intended, said the Master of the Rolls, to treat committals and attachments as identical in the Rule, and although there is no good reason in practice why they should not be so treated, it is not likely after this judgment of the Court of Appeal that they will be again regarded as synonymous until there is some further amendment of the Rules which puts them formally, so far as procedure is concerned at least, on the same footing.

REDEMPTION OF DEBENTURES.—A person who subscribes for a debenture may look to a transfer of the debenture as a means of getting his money back when he wants it, and the company are, therefore, able sometimes to introduce their own provisions as to repayment in the debenture; but the recent decision of Parker, J., in *Re Tewksbury Gas Co.* (1911, 2 Ch. 279), shews that such provisions must not contradict the primary liability of the company to pay the debt; they cannot leave the payment to the option of the company. In that case debentures issued in 1892, contained an agreement for repayment "on or

after 1st January, 1898," and provision was made for redemption of the debentures, and for determining by ballot which should be repaid. The 1st of January, 1898, passed, and the company never held any ballot or paid off any debentures, but they regularly paid the interest. A transferee of a debenture gave six months' notice requiring repayment, and on the money not being paid, sued for it, and Parker, J., held that the action was maintainable. The provision for payment on or after the fixed date allowed the company to postpone payment till that date, but the money then became payable on demand; and the provision under which the company might at their option hold a ballot, and repay according to the ballot, was repugnant to their primary liability to repay, and was void. The learned Judge also followed *Re Chicago and North-West Granaries Co.* (1898, 1 Ch. 263), in holding that a debenture cannot be construed by reference to the prospectus in pursuance of which it was issued. The contract between the company and the debentureholder is contained in the debenture, and the prospectus cannot be looked at for the purpose of seeing what the contract was.

LIEN FOR COSTS ON PROPERTY RECOVERED.—The decision in *Re Cockrell's Estate* (1911, 2 Ch. 318), is unsatisfactory from the solicitor's point of view, for it shews that although a solicitor may be entitled to a lien on property, under sec. 28, of the Solicitors Act, 1860, for the costs of proceedings to recover or preserve it, yet he may lose the benefit of his lien in consequence of his client being indebted to the estate of which the property forms part. Section 28, provides that where a solicitor is employed to prosecute or defend any suit, matter or proceeding in any Court of justice, the Court may declare him entitled to a charge upon the property recovered or preserved. In *Re Cockrell's Estate* the action was a creditor's action brought in 1907, for administration of the estate of a testator who had died in 1901. One of the executors died in 1908, having been previously declared a bankrupt. The plaintiff asked for the sanction of the Court to a provisional sale of property forming part of the estate for £383. The solicitor of the surviving executor opposed this, and a sale by auction was ordered and produced £400. The surviving executor was found to be indebted to the estate to the extent of £64, and on further

consideration he was allowed his costs, but these were to be set off against the £64 due. Owing to his circumstances, this meant that his solicitor would not be paid, and the solicitor sought to avoid this result by applying for a lien on the £400 for his costs of the sale. At first sight it may not be clear that any property was "recovered or preserved" in a "suit, matter or proceeding;" but Neville, J., held, that these words were wide enough to cover the realization of property under the order of the Court, and hence the case was one in which the declaration of lien might have been made, notwithstanding that the actual benefit, having regard to the costs of the sale, was nil. But the previous order as to costs had, in the learned Judge's opinion, rendered this impossible. The client had already obtained an order for payment of his costs, including the costs incident to the sale, and provision had been made for their payment by set-off. In these circumstances, to have allowed the lien would have been equivalent to paying the costs twice over, and the application, therefore, was refused.

FORFEITURE OF DEPOSIT.—It is a well-known principle of law that a person cannot enjoy the advantages of rescission without yielding up every benefit he has taken by the previous part performance of the contract. It follows that a vendor cannot have rescission and damages for breach of a contract. But an exception occurs, or was thought to occur, in the case of a deposit paid to the vendor on a sale, and it seems to have been established by *Dunn* v. *Vere* (19 W. R. 151), and *Howe* v. *Smith* (27 Ch. D. 89), that, in the absence of a stipulation to the contrary, the intention will be implied, from the very nature of the deposit, that it shall be a guarantee for the purchaser's due performance of the contract, and shall be forfeited on his default to the vendor. It is true that in *Macbeth* v. *Marlar* (1 Cox 259), a vendor suing for rescission was decreed to return the deposit, but the point there was not argued or contested, and the decision must be taken as overruled by *Howe* v. *Smith*. Then came the case of *Jackson* v. *De Kadich* (1904, W. N. 168), where the deposit was in the hands of stakeholders, and the vendor asked for rescission and a declaration that he was entitled to the deposit, but Farwell, J., said the vendor could not have rescission, and at the same time damages for the breach of the contract; that in *Howe* v. *Smith*

there was no rescission, and in the absence of authority, he declined to make the declaration asked for. The learned Judge, however, was clearly wrong in saying that there was no rescission in *Howe* v. *Smith;* the vendor there had elected to rescind, and had, in fact, rescinded by reselling the property as owner. We discussed the matter before in relation to a decision of Neville, J., in *Jones* v. *Burnell* (since noted in W. N. 1911, p. 153). Curiously enough, the point again came before the Court for decision in *Hall* v. *Burnell,* when Eve, J., regretted that he should have to decide so important a point on the last day of the sittings. In that case the deposit had been paid to the plaintiff's solicitors as stakeholders, and the contract contained no clause as to forfeiture; the vendor asked for rescission and a declaration that he was entitled to the deposit. Eve, J., said he could not conceive that the fact of the deposit being in the hands of stakeholders could make any difference; he did not think Farwell, J., fully understood the facts in *Howe* v. *Smith,* and he made the order asked for. The point, therefore, seems to be finally settled.

NEW TRIALS IN CRIMINAL CASES.—The judgment of the Criminal Appeal Court in *Rex* v. *Ellson,* is also important as containing what can only be regarded as a strong protest against the policy of the Criminal Appeal Act, and an equally strong suggestion for the amendment of the Act, addressed to the legislature. Darling, J., of course, voicing the Court itself, said that it was greatly to be regretted that a new trial could not be ordered, as would have been the case in civil proceedings, where a verdict is set aside on the ground of misdirection: "It was desirable that all the facts should again be submitted to a jury with an adequate and proper direction, and they hoped that what he was saying would at all events be considered by those who had power to amend the law in this respect." With all deference to the Court of Criminal Appeal, it is by no means certain that the powers that be would be well-advised to "amend the law in this respect." The policy of the Criminal Appeal Act, 1907, is to afford facilities for the accused person to appeal from a conviction, not to enable the Crown to appeal against acquittals. Where "a point of law of exceptional public importance" is involved, sec. 1 (6) of the Act makes provision for an appeal to the House of

Lords by either prosecution or defendant, and one case under this enactment has occurred—*Rex* v. *Ball* (1911, A. C. 47). But this is the only instance in which the Act of 1907, does anything to enable the prosecution to appeal against acquittals. And the possibility that a villain may have escaped the hangman through the net provided by the Criminal Appeal Act, does not seem to be sufficient justification for further trenching on the broad differences that still exist between criminal and civil procedure. It is rather implied, in the strong remarks of the Court of Criminal Appeal in the case of *Rex* v. *Ellson,* that the want of power to order a new trial as in civil cases is a defect, or possibly a *casus omissus,* in the Criminal Appeal Act. It is submitted that the power of ordering a new trial was not accidentally omitted from the Act of 1907, and is better not conferred in criminal cases.

MORTGAGEES' COSTS.—*Williams* v. *Jones,* raised a rather important question with regard to mortgagee's costs. The mortgagee realized his security and admitted having in hand a surplus of £103. The mortgagor refused to accept that statement, and brought an action for account, the result of the account being to increase the surplus to £199. Each party claimed to recover costs against the other, and the question was whether this was an action in which the mortgagee was entitled as of right to his costs unless he had forfeited them by misconduct, or whether it was an action in which the incidence of the costs was in the discretion of the Court. On behalf of the mortgagee, it was contended that the action was in substance a redemption action, or partook so largely of the nature of redemption action as to involve the application of the well settled rule as to costs in redemption actions. On the other hand, it was said that this was not a redemption action, but one in which a *cestui que trust* was asserting, and a trustee was denying, the existence of a trust fund in the hands of the trustee. Eve, J., thought that the latter contention ought to prevail, and held that the action was not one in the nature of a redemption action, and therefore the costs were in the discretion of the Court. The learned Judge seems to have assumed, and the point was not argued, that the rule as to mortgagees' costs only applies to actions for foreclosure or redemption. But is this so? It is true that Lord Selborne in *Cotterell* v.

Stratton (L. R. 8 Ch. 302) states the rule thus: "The contract between mortgagor and mortgagee makes the mortgage a security . . . for the costs properly incident to a suit for foreclosure or redemption." But he does not say that the rule applies to those actions only and to no others, and there is no reason to suppose that he intended to restrict the rule which before *Cotterell* v. *Stratton* was a general one and has been thus stated: "A mortgagee does not in terms contract for costs, but the rule is that all costs which he as mortgagee properly incurs in relation to his security are to be allowed to him." Applying this test to the present case, were the costs incurred by the defendant as mortgagee? We think they were. The defendant was still a mortgagee if we are right in thinking that the relationship of mortgagor and mortgagee exists so long as there is any question of account between them, and that a mortgagee only becomes a trustee when the amount of the surplus is finally ascertained. We venture to doubt, therefore, whether the case was rightly decided, and whether the often quoted passage of Lord Selborne bears the interpretation generally put upon it.

CURRENT COMMENT.

THE ONTARIO BAR ASSOCIATION.—The annual meeting of this association will be held at Osgoode Hall, Toronto, on Wednesday and Thursday, 27th and 28th December. An interesting programme has been prepared. The annual banquet will be held on Wednesday evening.

WHAT IS A "TAME" SOLICITOR?—In a case recently tried in the Law Courts the unfamiliar expression a "tame solicitor" was frequently used. It was explained that this expression meant a solicitor who, for a consideration, lent his name, while others did the work and received the profits. In the case referred to the evidence did not support the suggestion. There is, however, such a thing as a "tame solicitor," and it is desirable that the public should know it. Many people may be surprised to learn that in London (it is impossible anywhere else) there are quite a number of men

who are not on the rolls, have never been articled, have never passed an examination, and yet practise as solicitors. Nominally, of course, they are acting for a "principal," but he never appears. He is much too old and decrepit for that, and is perforce content to accept a small annual fee for the use of his name. I knew a man who for many years carried on in the way described a large and lucrative practice, and this in a building where there were solicitors who had spent large sums of money to qualify themselves for their profession and could barely make a living. The Law Society seems to be powerless to deal with such cases; but the public, if they will insist now and then upon seeing the "principal" to the clerk who regularly transacts their legal business, may do much to check the evil. It is clear that something should be done. Solicitors in these hard times cannot afford to submit to unlawful competition.

THE NEW JERSEY LEGAL AID SOCIETY.—Mr. Theodore Gottlieb describes the work of the New Jersey Legal Aid Society in the *New Jersey Law Journal* for June. The society was established, he says, about ten years ago, with the policy of the New York Society as a model, and is an incorporated charitable society endorsed by the committee of the Board of Trade. "It is founded on the democratic principle that justice is a matter of right to all men, and, despite many inequalities inherent in our social, political and legal systems, it aims, nevertheless, to place the rich and the poor on a substantial equality before the law. The object and purpose of all legal aid work is well stated in the platform of the Chicago society:

First. To assist in securing legal protection against injustice for those who are unable to protect themselves; and this is accomplished by assisting such deserving persons who are financially unable to employ an attorney to prosecute or defend a just cause, the society maintaining an attorney for that purpose.

Second. To take cognizance of the working of existing laws and methods of procedure and to suggest improvements.

Third. To prepare new and better laws, and to make efforts towards securing their enactment and enforcement.

There are several large and cosmopolitan cities in New Jersey where dwell thousands of poor, ignorant and defenceless aliens, and these, and often our native intelligent poor as well, are victims of oppression and are plundered because they have not the means to invoke the law in their behalf or to protect themselves. The ordinary disputes arising out of contract, fraud, detention of chattels or disputes with landlords cannot be settled without investigation and often must be taken to a district Court for redress. This Court is known as the "poor man's Court," because the fees for summons, constable and other Court charges are small, amounting to about five dollars per case, exclusive of an attorney fee or five to twenty-five dollars, but often these costs alone are an insurmountable barrier to the poor client with a valid claim, and thus 'equality before the law' is, in that specific case, but an empty, high-sounding and meaningless phrase.

These small cases are important; they cannot and should not be ignored. The alien, the defenceless and the victimized, smarting under the sting of an injustice, must be taught respect for American law and institutions, and that the basic principle of law is equality; and the start in the right direction is made when we teach them that there is justice for the poor and the oppressed. The New Jersey Legal Aid Society has offices with the Bureau of Associated Charities, and branch offices in Hoboken and Jersey City, where its attorneys may be consulted by applicants, correctly advised of their legal rights, and, if necessary, the appropriate legal steps are taken for the redress of grievances.

Since its organization the society has disposed of over 7,500 cases of all kinds, the greatest number of single matters being wage and service claims. In this matter it has been of great service to the poor servant, the ignorant farm hand and foreign mechanics, all too poor to pay for enforcing their legal rights. All cases of this nature are investigated, a letter written, followed, if necessary, by a personal call and, in some cases, by suit in the district Court.

PRACTICAL LEGAL EDUCATION. — Legal education is gradually becoming more practical. A system has recently

been established in two of the Inns under which young barristers are encouraged to make themselves acquainted with the practical work of their calling by "reading" in the chambers of counsel blessed abundantly with briefs. At Gray's Inn there is an excellent Moot Society which enables students to take a serious part in mock trials. This was the old method of legal tuition, and it is surprising that only one of the Inns has seen fit to revive it. Not long ago the French Minister of Justice appointed an actor of the Comédie Francaise to teach young Parisian lawyers how to "use their natural gifts to the best advantage." The Benchers have even been recommended to arrange for lessons in elocution in the Inns. Although advocacy is not exactly among the things that can be taught—it requires a combination of too many qualities to come from mere tuition—yet a study of the methods of the most notable exponents of the art is not without its uses. It is rather strange that the Council of Legal Education, which, in addition to its ordinary classes, arranges for evening courses of lectures by well-known members of the Bar, makes no provision whatever for the study of this part of the barrister's work. A systematic study, under the guidance of some competent lecturer, of the State trials and the most famous speeches delivered at the Bar would give another practical and attractive turn to legal education in the Inns.

THE "THIRD DEGREE."—Henry C. Spurr, in a recent article in *Case and Comment*, discusses the legal aspect of confessions made to police officers. Among other things he says:

"The Hon. Orlando Hubbs, of Long Island, came forth at the present session of the New York Senate, with a bill designed to shield persons under arrest from the terrors of this modern inquisition, as some of the observers are pleased to call the police practice of questioning prisoners. The bill makes any admission by the defendant while under arrest inadmissible as evidence unless corroborated by a disinterested person and the defendant has been advised that his admissions may be used against him. As in the case of the good deacon who always accepted every adverse stroke of

fortune with resignation, but who finally declared it was about time to express his sentiments when one day a tornado came along, uprooted his trees, levelled his fences and barns and knocked the deacon himself in a heap behind his cow stables, it would seem as if the time had come to say something on the other side of this question on behalf of a sane administration of the criminal laws for the protection of life and property, especially in view of the fact that we in America have already been at such pains to safeguard every interest of the accused that it sometimes takes as long as three months to get a jury in a criminal case, and when, by reason of delays and technicalities and new trials, the course of justice is so impeded and the punishment of crime made so uncertain that our administration of criminal law has caused us to become a laughing stock in other countries. Before making this new crossing suggested by Senator Hubbs, is it not our duty to stop and look and listen?

"An examination of the cases will shew that the Courts have been influenced by two theories as to the propriety of the use of confessions. The first of these may be called the humanitarian theory. It is responsible for all the courtesies that have been extended to persons accused of crime, for the delays and the technicalities which have made the administration of the criminal laws at the present day so slow, so uncertain and, in many respects, so unsatisfactory. As applied to the exclusion of confessions, it has been called by Jeremy Bentham, in his 'Rationale of Judicial Evidence' (7 Bentham's Works, Bowring's edition, p. 454 ff), 'the fox hunter's reason.'

"The other theory is that confessions are to be excluded only when there is reason to believe that they may not be true. If they appear to be reliable, the fact that the accused may have been taken off his guard is no objection to them, since the punishment of crime is not a sport or a game, but a serious business, made necessary for the welfare of society and the protection of life and property. 'The reason for the exclusion of confessions, says the Court in *People* v. *Wentz*, 37 N. Y. 304, 'is not because any right or privilege of the person has been violated, but because it is deemed unsafe to rely upon it as evidence of guilt.'

"There is, of course, some real danger that confession may not be true. It would hardly seem as if an innocent

man would admit the commission of a serious crime; but experience has amply shewn that they may do so. It has been said that 'the human mind, under the pressure of calamity, is easily seduced, and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth as different agitations may prevail.' (2 Haw, P. C. 6th ed., p. 604.) Let this be conceded. Then, if the reliability theory as to the admission of confessions is sound, the problem of dealing with the third degree is not whether the personal comfort of the accused is likely to be disturbed, but whether admissions secured in this way can be depended upon. Are innocent men being brow-beaten into confessions of crime by means of the third degree?

"It is unquestionably true that many criminals have confessed their guilt or have made admissions which have led to their conviction, under the 'grilling' of the police, which they would not have done if they had had time for deliberation, or had had an opportunity to consult counsel. Many have been convicted when they would have gone free had they kept still, but this is far from being against the peace and welfare of society. It is rather for its benefit. As before stated, it is the serious business of the State to discover and punish the guilty, and, if the police are assisted in their part of this duty by the employment of the third degree, honest men need not be conscience stricken because the process is not always entirely fair, in the sense that word is used by the sportsman, to the criminal.

"But conceding the purpose of the police to be honest, are unreliable confessions produced by means of the third degree? Confessions extracted by means of physical torture are worthless. Are statements drawn out by this so-called mental inquisition also not to be relied on? When it is remembered that nothing that can operate on the hopes or the fears of the accused is permitted, nothing that can be construed either as an inducement or a threat is allowed, it would seem as if little room were left to lead an innocent man to say he is guilty. An examination of all the reported cases on the subject will shew in fact that there is little chance of this. And if this is so, the proposed New York law would not be a benefit, but a menace to the State.

"If Senator Hubbs' bill should become a law, it would practically shut out all confessions, for, in cases in which

they might be useful, how are they to be corroborated by a disinterested person, Who is this disinterested person to be? It would mean that conviction must be secured without confessions.

"If there is to be any restriction in the use of confessions, it would seem as if it ought to be aimed at verbal admissions. These are oftentimes extremely unreliable, because the words of the accused may have been misunderstood and misinterpreted, and because he may be misrepresented, owing to the infirmities of the memory of witnesses and, also—to concede a point—by the desire of an overzealous public officer to convict one whom he believes guilty of a crime. But if the confession is signed by the accused, or taken down accurately when it is made, and there is every reason to believe that it is true, it would seem as if it ought not to be rejected simply because it was obtained by means of the third degree.

"On every side the cry is raised that we are altogether too lax in the enforcement of our criminal laws. It would seem as if no necessity had yet been shewn for the erection of a new barrier to the punishment of crime by the abolition of the third degree."

CHURCH BELLS A NUISANCE.—It was laid down sixty years ago in the case of *Soltan* v. *De Held* (1851), that the excessive ringing of church bells may be a nuisance which the Courts can restrain by injunction. But in that case the bells were attached to a Roman Catholic church, and Vice-Chancellor Kindersley expressly distinguished the position from that which would arise if there were complaints of the ringing of the bells of a parish church. The latter are regarded by law as an appendage to the church, and this ringing before service prescribed by ecclesiastical law and sanctioned by the State. Recently, however, an Australian Judge has granted an injunction to restrain the ringing of bells of a Church of England place of worship between 7.30 and 8 a.m. on Sunday mornings. The plaintiff in the case (*Haddon* v. *Lynch*), which was tried in the Supreme Court of Victoria, complained, with several of his neighbours, that the ringing had the effect of awakening his family and was an unjustifiable interference with his

comfort. And the Judge, applying the rule as to nuisance propounded by Knight-Bruce, V.-C., in *Walter* v. *Selfe* (1850), held that to be roused from sleep on Sunday morning at half-past seven by your neighbour's bell was an inconvenience materially interfering with the ordinary comfort physically of human existence; and further that the laudable purpose for which church bells are rung afforded no excuse. Churches are not exempt from the application of the maxim: '*Sic utere tuo ut alienum non laedas.*' We doubt, however, whether an English Court would be so regardful of the late slumberer on the Sunday. Apart altogether from the question of the right of the Established Church to ring bells before each service for the purpose of summoning the people to prayer, an injunction would probably be refused on secular grounds. For unless there were something excessive in the ringing, the position would seem to be covered by the remark of Lord Selborne in *St Helen's Smelting Co.* v. *Tipping* (1865). 'Are not church peals in the early morning a necessary incident of life in a village or town to which the inhabitants must subject themselves?' The Australian Judge thought that they were not, and forbade the ringing at an earlier hour than 9 a.m. Perhaps some sympathetic Judge here may be found to follow his example, and restrain night-chimes, or early morning peals, as useless sounds against which a man may have protection if they disturb his repose though a hundred other men may not be disturbed by them.

LABOUR FOR PRISONERS.—A novel experiment in humanizing the prisoners has been carried on for some time at Montpelier, Vt., of which Mr. Morrison I. Swift gives an interesting account in the *Atlantic Monthly*. Not long ago the public press contained extensive comments upon a situation which has been found to exist in many of the State prisons, and a magazine article, which described how a great manufactory has its goods made by convicts in several States for thirty-four cents a day, gained considerable notoriety. The situation in Montpelier as described by Mr. Swift's article presents a positive contrast to this one.

In the streets of Montpelier, after visiting the prison, Mr. Swift met five or six of the very prisoners he had seen

in jail, now walking about the streets with no prison garb, apparently free, contented and happy. They had been out to do their daily work, and, when it was over, of their own accord returned to the prison. The system under which this singular state of affairs was made possible was brought about by the sheriff of the county in which Montpelier is situated. He found a law which permitted those prisoners in the county jail who are committed for the less serious offences to be put at work "either within or without the walls of the prison." It seemed to him that most of the prisoners deserved compassion rather than blame; that prison life without regular work was degrading them and injuring their health, and that it turned them out at the end of their terms worse physically and morally than when their imprisonment began. At first he put some of the men to work on his own farm, paying the State for their labour. Later he put them at work in laying water-mains; their wages, $1.75 a day, all went to the State. But these experiments were complete failures. The men shewed no interest in the work, and did just as little as they possibly could. The sheriff, Mr. Tracy, discovered the reason of the failure one day when he asked one of the prisoners why he would not work well, and received the reply, "I'm doing just as little as I can and not be punished, and I'm going to keep on. You would do the same." Instantly the idea occurred to Mr. Tracy that he might furnish an incentive to the men to work, and he asked, "If you could have seventy-five cents for yourself from your work every day, what would you do?" "Try me," was the answer. From that time on the pay received for the work was divided. Out of the full labourer's wage of $1.75 a day, one dollar was given to the State, and seventy-five cents was retained by the sheriff for the prisoner, and the accumulated sum paid to him when he left prison. The innovation was extended and the men's earnings now amount to a considerable sum.

The Montpelier plan succeeded because under its operation the prisoners were trusted. They were given responsibilities of their own.

Mr. Swift says that "when such a prisoner finds that he is treated as a man, 'a feeling of mingled surprise, gratitude, elation, and pride, awakens in him; he learns for the

first time the value of social esteem and determines to deserve it.' Other counties have, to some extent, adopted the system, but so far not with anything like the success obtained in Montpelier. It is evident that the personal equation counts in this matter, and that the character of the sheriff at Montpelier has a good deal to do with the success of the experiment there; an officer carrying on such a system must not only be a "combined labour bureau and labour exchange," but must have a really sincere interest in the welfare of the prisoner. The law itself was not a remarkable one, but the way in which it has been carried out seems extraordinary, and full of suggestion and promise. The Montpelier plan appeals to the self-interest of the prisoner in a practical way, and it develops also strength of purpose and self-respect. One question at once arises in the minds of the readers: What attitude would the labour unions take as regards such a plan? At Montpelier the men have been employed only in comparatively unskilled forms of work, even although they had learned a trade; but Mr. Swift tells us that he was assured, by a trade union leader that there would not be the slightest objection on the part of the unions to any man with a trade exercising it, provided he were given union wages. It would not be safe to draw sweeping conclusions from the experiment described; but it is certainly true that such an attempt deserves most careful consideration. Mr. Swift points out that there has been a general movement the country over in the direction of giving a new chance to criminals who are not hardened. As a striking instance of this he quotes a sentence imposed by a Judge in Los Angeles upon a young man who had embezzled five thousand dollars and spent it in dissipation: "You shall stay at home nights. You shall remain within the limits of this county. You shall not play billiards or pool, frequent cafes, or drink intoxicating liquor, and you shall go immediately to work and keep at it until you have paid back every dollar you have stolen. Violate these terms and you go to prison.'"

WHERE THERE ARE NO LAWYERS.

The devil came to the earth one day,
And into a courtroom took his way,
Just as a lawyer, with very grave face,
Was proceeding to argue the points in a case.

Now a lawyer his majesty never had seen,
For to his dominion none ever had been;
"'Tis the fault of my agents," his majesty thought,
"That none of these lawyers have ever been caught."
And for his own pleasure he had felt a desire
To come to the earth and the reason inquire.
Now, when the first lawyer had come to a close,
The counsel opposing him fearlessly rose,
And heaped such abuse on the head of the first,
That he made him a villain, of all men the worst.
Each claimed he was right and the other was wrong.
They sparred and contended and argued so long,
That, concluding, he'd heard enough of the fuss,
"Old Nick" turned away, and soliloquized thus:
"They have puzzled the Court with their villainous cavil,
And I am free to confess they have puzzled the devil,
My agents were right; let lawyers alone—
If I had them, they'd euchre me out of my throne."

THE LATE JUSTICE HARLAN.—If the great tribunal of which the late Justice Harlan so recently ceased to be a member were not regarded as one of the main foundation stones of the Government of the United States, whose sustaining and supporting strength is supreme even over the personalities of its component parts, it would be little less than appalling to see such a rapid succession of changes as has recently been witnessed in the membership of the United States Supreme Court. For the death of Justices Peckham, Brewer and Fuller, and the retirement of Justice Moody, brought four new faces to that great bench within two years. Now death has claimed the veteran Harlan, than whom, perhaps, no more interesting or picturesque personality ever sat in that quiet chamber, where so much of national history has been made. Characterized by independence of thought and tenacity of conviction, Harlan became known as the "Great Dissenter," often a lonely, but always a splendid figure among the great men who were his associates.

Justice Harlan was not aggressive or independent merely for the sake of running counter to the opinions of others. Impelled by the deepest conviction he decided great questions according to his own standard of justice, regardless of whether his views squared with those of others. That, in spite of this and in spite of his numerous dissents, in which he frequently stood alone, he should have retained throughout his long career on the bench the abiding love and profound respect of his associates, is a signifi-

cant tribute. The explanation lies in the fact that with his well-known tenacity of purpose he possessed a true kindliness of heart, a constant devotion to the strict—even old-fashioned—doctrines of the Presbyterian Church, and the simple courage and philosophy and independence of a plain American citizen. The sincerity and candour of the man, together with his incisive logic and his faith in the future of the nation, compelled those who disagreed with his opinions to esteem and honour him.

The trait which dominated the life of Justice Harlan was an indomitable will, guided by plain, hard thinking. When he had determined the right or wrong of a question according to his analysis, he never wavered, never compromised. His principles were as immutable as the Constitution itself, and as clearly established as those of his great predecessor and namesake, Chief Justice Marshall. He stood forth, the aggressive champion of constitutional principles as he conceived them.

His strict Presbyterianism bore the unyielding imprint of the distinguished founders of that faith; his reverence for the Sabbath was that of the Pilgrim Fathers, and the constitutional principles which he so consistently followed were essentially the principles of an earlier age in the American republic—an age when the exigencies and interests of business were not so extensive and predominant.

Perhaps this may account in part for his refusal to consent to the "rule of reason" in judicial interpretation, which, he argued, was judicial legislation. He did not insist that a definite line could be drawn which would differentiate judicial legislation from judicial decision, for every decision of the Supreme Court is, in a sense, legislation,—in the nature of American institutions this must necessarily be so; but Justice Harlan did condemn severely what he considered a tendency on the part of the Supreme Court to extend its dominion in this respect. Consequently, in the great trust cases recently decided, he maintained his opinions in no uncertain language. In his own words:—

"After many years of public service at the national capital, and after a somewhat close observation of public affairs, I am impelled to say that there is abroad in our land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction."

SIR FREDERICK POLLOCK — Sir Frederick Pollock's lectures at Columbia University are attracting the cream of the American Bar, and are reported by the general as well as the technical newspapers. According to the New York reporters, Sir Frederick Pollock is amazed at the levity with which Americans criticise their judicial institutions, and the recklessness with which the Judges are assailed. In addressing 400 attorneys of New York, he spoke his mind rather freely. He said: "I can hardly believe my eyes when I read in your newspapers allegations or intimations that such and such a Judge had been bought by a Trust, or that another one was controlled by politicians. These charges have been in regard to your civil Judges. Of your Federal justices it has been said that they read words in the statutes which are not there. When a Judge renders a decision here in the United States which is against popular opinion, although strictly accurate within the law, there is a cry of "Let us have the recall." In England, where a Judge holds office during his good behaviour, there is never any such criticism. He is universally accepted as an honourable man; his decisions are not questioned nor commented upon. We believe in England that the popular election of Judges is a bad thing. We believe, too, that the American people, having themselves elected their Judges, should be compelled to accept them during their terms. Let them elect better ones next time."

A MODEST WITNESS.—The lawyer had a somewhat difficult witness, and finally asked if he was acquainted with any of the men on the jury.

"Yes, sir," replied the witness, "more than half of them."

"Are you willing to swear that you know more than half of them?" demanded the lawyer.

"Why, if it comes to that, I'm willing to swear that I know more than all of them put together."

The Library

"And what of this new book?"—*Sterne.*

"Men disparage not antiquity who prudently exalt new enquiries."
—*Sir Thomas Browne.*

The Contemporary Review. Edited by SIR PERCY BUNTING, London: The Contemporary Review Co., Ltd., 14 Henrietta St., Covent Garden, W.C. Price, half-a-crown monthly. October number.

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The National Review. Price 2s. 6d. net, monthly. Preferential Canadian subscription rate one year, post free, $5; six months, $2.50; three months, $1.25. Edited by L. J. MAXSE, 23 Ryder Street, St. James, London, S.W. Canadian agents, Wm. Dawson & Sons, Ltd., Manning Chambers, Toronto. October number.

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